SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH, PETITIONER,

vs.

THE STATE OF TEXAS.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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4 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

(Caption omitted)

No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

The State of Texas }
County of Ellis } District Court

Second Day—Tenth Week—February 7, 1961

Now at this time comes into open court the Grand Jury, a quorum being present, and through their Foreman, J. I. Cornwell, presents the following Bills of Indictment; endorsed on each "A True Bill", to-wit:

THE STATE OF TEXAS

No. 10902 vs.

Theft

Indictment—Filed February 7, 1961

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS, for the county of Ellis, State aforesaid, duly organized as such at the December Term, A.D. 1960 of the District Court of the Fortieth Judicial District for said County, upon their oaths in said Court present that JAMES E. BUSH on or about the 21st day of October A.D. 1960, and anterior to the presentment of this Indictment, in said County and State, was then and there a person who had theretofore been convicted of two felonies less than capital, in this, to-wit:

The said James E. Bush on the 12th day of November, A.D. 1941, in the 88th District Court of Eastland County,
5 State of Texas, in Cause No. 10330 on the Docket of said Court, styled the State of Texas vs. J. E. Bush, said Defendant was duly and legally convicted of

Theft of Cattle, said offense being then and there a felony, and which said Court had jurisdiction of said offense of Theft of Cattle, a felony.

And after the judgment of conviction in said Cause No. 10330 had become final, said James E. Bush committed the offense of Theft of property of the value of over $50.00, a felony, and on the 18th day of February, A.D. 1946, was duly and legally convicted of said offense of Theft of property of the value of over $50.00 in the Criminal District Court of Tarrant County, Texas, in Cause No. 46490 on the Docket of said Court, styled the State of Texas vs. James Edgar Bush, and which said Court had jurisdiction of said offense of Theft of property of the value of over $50.00.

And the Grand Jury aforesaid do further present in and to the said Court, at said term, that on or about the 21st day of October, A.D. 1960, in said County of Ellis and State of Texas, and after the Judgment and conviction in said Cause No. 10330 and the Judgment and conviction in said Cause No. 46490 had become final, the said James E. Bush, who is the same person so twice formerly convicted, did on or about the 21st day of October, A.D. 1960, and anterior to the presentment of this indictment, in the County of Ellis and State of Texas, did then and there, fraudulently take money of the value of Five Hundred Dollars, the same being the corporeal property of L. C. Hackler from the possession of the said L. C. Hackler without the consent of the said L. C. Hackler with the intent to deprive the said L. C. Hackler of the value thereof, and with the intent to appropriate it to the use and benefit of him, the said James E. Bush, against the peace and dignity of the State.

J. IRVIN CORNWELL
Foreman of the Grand Jury.

6 Endorsement
No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

INDICTMENT

OFFENSE:

THEFT

FILED
FEBRUARY 7, 1961

Mrs. Jake Talley

District Court, Ellis County
Texas

A TRUE BILL

Foreman of the Grand Jury

Names of witness upon
whose Testimony
Indictment was Found

Mrs. C. Hackler

Mr. C. Hackler

Sergt. Gilbert Hurst

Sheriff Wayne McCollum

Willis Cox

Otis Mayer

W. E. Bryant

Earl Conner, Jr.

Charlie Smith

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion to be Sent to a Mental Institution for Diagnosis—Filed April 21, 1961

Now comes the Defendant in the above entitled and numbered cause and requests the Court to send the Defendant, JAMES E. BUSH, in this case to a mental institution for diagnosis and/or observation before he is placed on trial in this case and in support of such Motion would allege the following:

(1.) That heretofore, to-wit, on February 14, 1924, in the County Court, Navarro County, Texas, in case no. 3387, tried before a jury, in an Inquiry of Lunacy pro-

ceeding the court adjudged that the said JAMES E. BUSH was a lunatic and also ordered him to be conveyed to the lunatic asylum for restraint and treatment, and the said judgment has not been vacated or set aside.

(2.) The Defendant, by his attorney, has reason to believe and does believe that the said Defendant is at the present time and was at the time of the commission of the alleged offense an insane person.

(3.) That the Defendant is an indigent person and does not have the necessary finances to provide himself with counsel for his defense and without the necessary finances to provide himself with the necessary psychiatric tests, examinations, and evaluations concerning his mental state of being.

(4.) That without being sent to an institution for diagnosis and/or observation the Defendant will be denied the right to a fair trial and that he will not be able to adequately prepare his defense to the pending cause.

(5.) That the proceedings now pending against the Defendant in the above entitled and numbered cause should be suspended until such time as his mental state of condition could be observed, diagnosed and evaluated.

(6.) That because of his indigent condition he will be precluded from admission to a mental hospital according to the right given him under Article 932 b, Section 8 of the Texas Code of Criminal Procedure wherein it provides "no person shall be committed to a mental hospital under this chapter except on competent medical or psychiatric testimony," unless the Court provides him with competent medical or psychiatric observation, diagnosis, and evaluation.

Billy J. Moore
BILLY J. MOORE
Attorney for the Defendant,
JAMES E. BUSH.

APPROVED:

Refused: April 21, 1961

A. R. STOUT, *Judge*,
to which defendant duly excepted.

8 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion for Appointment of Competent Psychiatrist—Filed April 21, 1961

Now comes the Defendant in the above entitled and numbered cause and requests that the Court appoint and pay for a competent independent psychiatrist's services so that the Defendant can adequately prepare his defense to the above entitled and numbered cause; and for suspension of the above proceedings for a period of time sufficient to enable the psychiatrist to observe, diagnose, and evaluate the Defendant's mental condition, and in support would also allege the following:

(1.) That heretofore, to-wit, on February 14, 1924, in the County Court, Navarro County, Texas, in case No. 3387, tried before a jury, in an Inquiry of Lunacy proceeding the court adjudged that the said JAMES E. BUSH was a lunatic and also ordered him to be conveyed to the lunatic asylum for restraint and treatment, and the said judgment has not been vacated or set aside.

(2.) The Defendant, by his attorney, has reason to believe and does believe that the said Defendant is at the present time, and was at the time of the commission of the alleged offense, an insane person.

(3.) That Section 8 of Article 932 b of the Code of Criminal Procedure the State of Texas provides that "no person shall be committed to a mental hospital under this chapter except on competent medical or psychiatric testimony" and that the Defendant is without the necessary finances to employ a competent independent psychiatrist to observe, diagnose, and evaluate his mental condition and that the Court does not provide him with such service he will be denied the right to admission to a mental hospital

and will be denied the right to a fair trial because of his financial inability to provide himself with the necessary competent psychiatric testimony of this statutory provision.

Billy J. Moore
BILLY J. MOORE,
Attorney for the Defendant,
JAMES E. BUSH.

APPROVED:

Refused: April 21, 1961.

A. R. STOUT, *Judge*,
to which defendant duly excepted.

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion for Preliminary Insanity Hearing—Filed April 24, 1961

Now comes the defendant, James E. Bush, in the above entitled and numbered cause, by and through his attorney, and alleges that the defendant is mentally incompetent at this time to make a rational defense and asks the court to empanel a jury to try the issue of his mental competency at this time and at the time of the alleged commission of the offense charged against him.

Billy J. Moore
BILLY J. MOORE,
Attorney for Defendant.

10 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS.

No. 10902

(Title omitted)

Charge of the Court (Insanity)—Filed April 24, 1961

PRE-INSANITY TRIAL

Gentlemen of the Jury:

Our statute provides that in any criminal case where insanity is interposed as a defense and the defendant is tried upon the issue of insanity alone before the main trial, the jury shall find and determine whether the defendant was sane or insane at the time the act is alleged to have been committed, and also the jury shall find and determine whether the defendant is sane or insane at the present time.

This is a trial upon the issue of insanity alone. No other issue is before you; and no act done in a state of insanity shall be punishable for crime.

Every person is presumed to be sane until the contrary is shown by a preponderance of the evidence. The burden of proof is upon the defendant to establish his insanity by a preponderance of the evidence. This the defendant has done in a presumptive manner by the introduction into evidence of the purported lunacy judgment in Navarro County, Texas, in the year of 1924. The result of such judgment is to make it presumptively appear that the defendant is insane until such presumption is overcome by evidence by the State to show beyond a reasonable doubt that the defendant is sane, which the State is allowed to do, it being a question of fact for you to decide.

You are further instructed that the test of insanity at the time an act is committed is whether a person, at such time, knew right from wrong and the nature and quality of such act committed; if he did not so know at such time because of a defect in reason or because of physical
11 or mental infirmities, then he would be insane. The test of present insanity, that is at this time, is whether the defendant now knows right from wrong and the nature and consequences of his present acts. If the

defendant is now laboring under such defect of reasoning or under such physical or mental infirmities as not to know right from wrong or the nature and consequences of his acts, then he would be insane at this time.

If you believe from the evidence beyond a reasonable doubt that the defendant was sane on October 21, 1960, and is now sane, then you shall so find; but if you do not so believe from the evidence beyond a reasonable doubt, then you shall find accordingly and let your verdict reflect whether the defendant was insane on October 21, 1960, and whether he is now insane.

It is your duty to find and determine and state in your verdict whether the defendant was sane or insane at the time the act is alleged to have been committed on October 21, 1960; and also to find and determine and state in your verdict whether the defendant is sane or insane now, at this present time. Appropriate forms for your verdict follow. Your verdict will be signed by your foreman, who will be selected by you from among your own number.

s/ A. R. STOUT
Judge of the District Court
of Ellis County, Texas

Verdict of the Jury—Filed April 24, 1961

FORMS FOR VERDICT:

We, the jury, find the defendant to be sane at this time.

s/ V. B. HART, *Foreman*

We, the jury, find the defendant to have been sane on October 21, 1960.

s/ V. B. HART, *Foreman*

We, the jury, find that the defendant is now insane as of this date and present time.

....., *Foreman*

We, the jury, find that the defendant was insane at the time the act is alleged to have been committed on the 21st day of October, 1960.

....., *Foreman*

12 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

Judgment (Insanity)—April 24, 1961

Be it remembered that on this April 24, 1961, came on to be heard the above styled and numbered cause wherein the defendant filed his motion requesting that it be determined by the Court and jury whether he was sane or insane at the time of the commission of the alleged act by him on October 21, 1960, and also whether he is sane or insane at this present time; and both the State and defendant having announced ready for trial upon such preliminary matter, and a jury having been duly selected, impaneled and sworn, and after the evidence was adduced and the charge of the Court delivered in writing and argument had by counsel on both sides, the jury after deliberation returned into open court the following verdict, to wit: "We, the jury, find the defendant to be sane at this time. V. B. Hart, Foreman," and "We, the jury, find the defendant to have been sane on October 21, 1960. V. B. Hart, Foreman."

Based upon said above verdict of the jury, it is therefore ordered, adjudged and decreed by the Court, as determined by said jury verdict, that the defendant, James E. Bush is now sane and that he was also sane on October 21, 1960, which is the date of the alleged offense pending against him.

Said preliminary hearing having been adverse to said defendant, James E. Bush, it is therefore ordered, adjudged and decreed that he stand trial upon the indictment for the offense which is alleged to have been committed by him on October 21, 1960.

s/ A. R. STOUT
Judge Presiding

13 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS.

No. 10902

(Title omitted)

MARCH TERM, A.D. 1961.

Plaintiff's Motion to Instruct Defense Counsel—Filed April 25, 1961

To the Honorable A. R. Stout, Judge of said Court:

Now comes Bruce Allen, County Attorney of Ellis County, Texas, and moves the Court to instruct defence counsel, Billy J. Moore, not to refer to the fact either on voir dire examination of the jurors or in argument to the jury, or in presenting evidence, that defendant, James E. Bush, will go to the penitentiary for life if found guilty in this case. This is not an issue to be considered by the jury.

s/ BRUCE ALLEN
Bruce Allen
County Attorney of
Ellis County, Texas.

Motion sustained and counsel for defendant instructed accordingly, to which defendant excepted.

A. R. STOUT
Judge

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS.

No. 10902

(Title omitted)

April 25, 1961

Jury duly selected, impaneled and sworn—and trial proper began.

14 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS.

No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

Charge of the Court—Filed April 25, 1961

MEMBERS OF THE JURY:

In this case the defendant James E. Bush stands charged by indictment in the fourth paragraph therein with the offense of theft of money of the value of $500.00.

Said property is alleged to have belonged to L. C. Hackler and said offense is alleged to have been committed in the County of Ellis and State of Texas on or about October 21, 1960. To this charge the defendant has pleaded "Not Guilty."

I charge you the following as the law applicable to this case.

Theft in general is defined to be the fraudulent taking of corporeal personal property, belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with the intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

By "fraudulent taking" as used in this charge is meant:

First. That the person taking knew at the time of the taking that the property was not his own.

Second. That the property was taken without the consent of the owner.

Third. That the property was taken with the intent to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking.

Now, bearing in mind the foregoing instructions and definitions, if you believe from the evidence beyond a reasonable doubt that the said defendant James E. Bush on

or about October 21, 1960, in the County of Ellis and State of Texas, did then and there fraudulently take money of the value of $50.00 or over, the same being the
15 corporeal personal property of L. C. Hackler, from the possession of the said L. C. Hackler without the consent of the said L. C. Hackler, with the intent to deprive the said L. C. Hackler of the value thereof, and with the intent to appropriate it to the use and benefit of him, the said James E. Bush, as alleged in the last paragraph of the indictment herein, then you will find the defendant guilty of theft and assess his punishment at imprisonment in the penitentiary for not less than two nor more than ten years, provided you further find that any or all of the allegations set out in the second and third paragraphs of the indictment, or that any or all of the allegations set out in either of said paragraphs, are untrue, or if you have a reasonable doubt as to the truth of any or all of the allegations set out in said second and third paragraphs of said indictment, and the form of your verdict will be as follows:

"We, the jury, find the defendant guilty of theft, as charged in the last and fourth paragraph of the indictment herein, and assess his punishment by confinement in the penitentiary for a term of years.

....., Foreman"

If you should find the defendant not guilty of theft, as charged in the fourth paragraph of the indictment herein, then you will disregard the second and third paragraphs of the indictment, and the form of your verdict will be as follows:

"We, the jury, find the defendant not guilty.

....., Foreman"

The indictment in this case, in addition to the fourth paragraph thereof, also alleges in the second paragraph thereof that the defendant, before the date alleged in the fourth paragraph of the indictment, committed and was duly, legally and finally convicted of a felony less than capital, to wit: the offense of theft of cattle, and the
16 said indictment also alleges in the third paragraph that, also prior to the date alleged in the fourth

paragraph and subsequent to the date of the alleged commission and conviction of the offense alleged in the second paragraph of the indictment herein, the defendant committed and was duly, legally and finally convicted of a felony less than capital, to wit: theft of property of the value of $50.00 or over.

To each of the said second and third paragraphs of the indictment, the defendant has pleaded that the allegations in said paragraphs are not true.

If you should find and believe from the evidence beyond a reasonable doubt that the defendant is guilty of theft, as charged in the fourth paragraph of the indictment herein, and you further find and believe from the evidence that the State has proven to your minds beyond a reasonable doubt that the defendant, prior to his commission of the offense, if any he committed, as alleged in the fourth paragraph of the indictment, was duly and legally convicted on the 18th day of February, 1946, in the Criminal District Court of Tarrant County, Texas, in Cause No. 46490 on the docket of said court, under the name of James Edgar Bush, of a felony less than capital, to wit: theft of property of the value of over $50.00, upon an indictment, which indictment, if any, was then legally pending in said last named court, and of which the said court had jurisdiction, and that said conviction, as set forth in the third paragraph of the indictment herein was a final conviction, and was a conviction, if any, for an offense committed by him prior to the commission, if any, and conviction, if any, of the offense charged against him and set forth in the fourth paragraph of this indictment, and you further find and believe from the evidence beyond a reasonable doubt that the defendant, prior to the commission, if any, of each of the aforesaid offenses by the said defendant, if any he committed, was duly and legally convicted on the 12th day of November,
17 1941, in the 68th District Court of Eastland County, Texas, in Cause No. 10330 on the docket of said court, under the name of J. E. Bush, of a felony less than capital, to wit: theft of cattle, upon an indictment, which indictment, if any, was then legally pending in said last named court and of which the said court had jurisdiction, and that said conviction, if any, was a final

conviction, and was a conviction, if any, for an offense committed by him prior to the commission, if any, and conviction, if any, of the offense charged against him in the third paragraph hereof, and that said conviction, if any, set forth in the second paragraph of the indictment herein, was prior to the commission, if any, of the offense set forth in the fourth paragraph of the indictment herein, and that each and all of the allegations set out in the second and third paragraphs of the indictment herein are true, then you will find the defendant guilty of theft as charged in the fourth paragraph of the indictment herein, and that each and all of the allegations set out in the second and third paragraphs of the indictment herein are true, and the form of your verdict will be as follows:

Verdict of the Jury—Filed April 25, 1961

"We, the jury, find the defendant guilty of theft as charged in the fourth paragraph of the indictment herein, and we further find that each and all of the allegations set out in the second paragraph of the indictment herein, charging a final conviction for the theft of cattle, and that each and all of the allegations set out in the third paragraph of the indictment herein, charging a final conviction for the offense of theft of property of the value of over $50.00, are true.

s/ PETE MILLER, Foreman".

If you find the defendant not guilty of theft as charged in the fourth paragraph of the indictment, herein, then you will disregard the second and third paragraphs of the indictment and find the defendant not guilty by your verdict as hereinbefore provided.

You are further charged that even though you may find and believe from the evidence beyond a reasonable
18 doubt that the defendant committed and was convicted for the offenses charged in the second and third paragraphs of the indictment herein, yet you are instructed that you cannot consider such commissions, if any, or convictions, if any, or any evidence relating thereto, if any, in passing upon the issue of the guilt or innocence of the defendant for the offense set out in the fourth paragraph of the indictment herein.

You are further instructed that each of the offenses referred to in any paragraph of the indictment herein are felonies less than capital and within the jurisdiction of the district courts and criminal district courts of this State.

After you have arrived at your verdict as herein instructed, you may use one of the forms hereinbefore set out in this charge by having your foreman sign his name to the particular form that conforms to your verdict, but in no event shall he sign more than one of such forms.

In case you find the defendant guilty of the offense charged in the fourth paragraph of the indictment herein, and you further find that each and all of the allegations set out in the second and third paragraphs of the indictment herein are true, then your verdict should conform to the third form of verdict set out in this charge and in such event you will not assess any term of punishment for the defendant as the punishment in such cases is fixed by law and same will be assessed by the court in its judgment after the return of your verdict duly signed by your foreman. After you have arrived at your verdict and had your foreman sign the proper form as set out in this charge, you will return this charge, together with your signed verdict thereon, to the court.

Upon the law of insanity, you are instructed that no act done in a state of insanity is an offense or punishable under our law. Every person is presumed to be
19 sane until the contrary is shown by proof, and the burden of proof is upon the defendant to establish his insanity by a preponderance of the evidence, but he is not required to establish such plea of insanity by evidence beyond a reasonable doubt.

In order for a person to be insane under the law, his mind must be so affected or mentally diseased that his reason is dethroned to the extent that he does not know the nature, quality or consequences of his act at the time, that is, he does not know the difference between right and wrong. You are further instructed in this connection that, by the introduction in evidence of his conviction for insanity in the County Court of Navarro County, Texas, in the year of 1924, the defendant has shown his said insan-

ity as a matter of law and proved same under the law by a preponderance of the evidence, and that such insanity on his part is presumed to continue and exist until he has been legally adjudicated to be of sound mind by a court of competent jurisdiction. Such conviction for insanity and such legal presumption of the continuance of such insanity may be overcome by proof; but the burden of proof is upon the State to prove by legal evidence beyond a reasonable doubt that the defendant was sane at the time of the commission of said offense, if any, and that he is also sane at this time before you would be warranted in finding said defendant of sound mind at either of such times; and if the State fails to so prove by evidence beyond a reasonable doubt, then you will find that the defendant was and is insane.

Bearing mind the above and foregoing instructions, you will determine as you find the facts to be from the evidence herin, whether or not the defendant James E. Bush is now sane or insane at this time; and whether or not he was sane or insane at the time of the commission of the offense which is alleged by the State to have been committed by him on or about October 21, 1960.

Proper forms for your verdict are hereinbelow set out, which will be signed by your foreman.

20 **Verdict of the Jury—Filed April 25, 1961**

"We, the jury, find the defendant to have been sane on October 21, 1960.

s/ PETE MILLER, Foreman."

"We, the jury, find the defendant to be now sane as of this date and present time.

s/ PETE MILLER, Foreman."

"We, the jury, find the defendant to have been insane on October 21, 1960, and therefore not guilty of the offense charged against him, by reason of such insanity.

....., Foreman."

"We, the jury, find the defendant to be insane at this time.

....., Foreman."

You are further charged that our statute provides that the failure of the defendant to testify shall not be taken as any circumstance whatever against him, and you are instructed that you must not allude to, comment on or discuss in your deliberations the failure of the defendant to testify in this case, and you must not consider the same as any circumstance against him whatever.

In all criminal cases the burden of proof is upon the State. The defendant is presumed to be innocent until his guilt has been established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt, you will acquit him and say by your verdict "Not Guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony; but you are bound to receive the law from the court, which is herein given you, and to be governed thereby.

s/ A. R. STOUT
Judge Presiding

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21 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

Sentence—Entered April 25, 1961

Upon the verdict of the jury, it is ordered and adjudged by the Court that the defendant be confined in the penitentiary of Texas for life—as provided by law and statute. The defendant in open court, upon the return of the jury verdict gave notice of appeal to the Court of Criminal Appeals at Austin, Texas.

A. R. STOUT,
Judge Presiding.

22 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

Judgment—April 25, 1961

THIS DAY This cause was called for trial, and the State appeared by her County Attorney, and the Defendant James E. Bush appeared in person, his Counsel also being present, and both parties announced ready for trial, and the Defendant, James E. Bush, in open Court pleaded "not guilty" to the charge contained in the indictment herein, thereupon a jury, to-wit: Pete Miller and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, to consider of their verdict, and afterwards were brought into open Court by the proper officer, the Defendant and his Counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit: "We, the jury, find the defendant guilty of theft as charged in the fourth paragraph of the Indictment herein, and we further find that each and all the allegations set out in the second paragraph of the indictment herein, charging a final conviction for the theft of cattle, and that each and all of the allegations set out in the third paragraph of the indictment herein, charging a final conviction for the offense of theft of property of the value of over $50.00, are true. We, the jury, find the defendant to have been sane on October 21, 1960. We, the jury, find the defendant to be now sane as of this date and present time.

PETE MILLER, Foreman."

It is therefore considered and adjudged by the Court, that the Defendant James E. Bush is guilty of the offense of Theft (Habitual) as charged in the indictment and as found by the Jury, and that he be punished, as has been determined by the Jury, by confinement in the Penitentiary for life, and that the State of Texas do have and recover of the said Defendant James E. Bush all costs in this prosecution expended, for which execution will issue; and that said Defendant is remanded to Jail to await the further order of the Court herein.

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion for New Trial—Filed May 9, 1961

Now comes JAMES E. BUSH, Defendant in the above entitled and numbered cause, and moves the Court to set aside the verdict of the jury and the judgment of the Court rendered herein and grant him a new trial for the following reasons, to-wit:

1.

Because the verdict of the jury regarding the insanity of the Defendant at the date of the trial and at the date of the alleged offense is contrary to the evidence, and the State failed to prove, beyond a reasonable doubt, with the evidence offered, that the Defendant was sane at the time of the alleged offense.

2.

Because the Court erred in granting the motion of the County Attorney restraining the defense counsel from referring to the fact that the Defendant would go to the penitentiary for life if found guilty in this case, either on voir dire examination of the jurors, in argument to the jury, or in presenting evidence, to which motion the

attorney for the Defendant strenuously objected and the Court overruled. Defendant's objection was on the grounds that the jury was entitled to know the necessary consequences of its acts and that the jury was entitled to know the nature and consequences of its acts in finding the Defendant sane at the time of the offense, sane at the time of the trial, and guilty of the charges. In this connection, the Court's charge to the jury was erroneous and misleading in that it asked the jury to assess the punishment if they found the Defendant guilty of theft.

3.

The Court erred in refusing to grant Defendant's motion that he be sent to a mental institution for diagnosis and/or observation before he was placed on trial.

4.

Because the Court erred in rejecting the Defendant's motion for the appointment of a competent independent psychiatrist to enable him to adequately prepare his defense to the alleged charges; and for suspension of the proceedings for a period of time sufficient to enable the psychiatrist to observe, diagnose, and evaluate the Defendant's mental condition.

5.

That the Defendant was denied his right to acquittal and right to a fair trial because of the Court's error in failing to appoint him adequate independent psychiatric services for the purpose of determining his sanity or insanity.

6.

Because the Court erred in instructing the jury that, in effect, "the prior judgment of insanity, which was not vacated or set aside, make it presumptively appear that the Defendant was insane at the time of the occurrence of the alleged charges and at the time of trial, over Defendant's objection to the Court's instruction by objecting as follows: that the jury should be instructed that the

Defendant having been once adjudicated insane by a jury, which judgment had not been set aside, or vacated, and which said judgment was properly introduced in evidence, was presumed to still be insane under the law.

25 7.

Because the Court erred in its charge to the jury by its instruction giving the test for insanity at the time of the trial as being the right and wrong test, to which instruction and charge the Defendant duly objected, and which objection was overruled, to which the Defendant duly accepted and requested the Court to submit the following instruction "You are instructed that 'insane' or 'insanity' is meant inability at this time by the Defendant to understand the difference between right and wrong and inability in mind to understand and appreciate the nature of the act charged against him in the indictment and the consequences thereof, and inability of the Defendant in mind to make a rational defense concerning said act of defense.

You are instructed that if you do not believe, beyond a reasonable doubt, that the Defendant, at this time, is sane, so that he does not know right from wrong in nature and consequences of his acts and so that he is able to advise and assist his attorney in preparing a rational defense to the offense of which he is charged, you will find him insane and so state in your answer to the special issue submitted to you."

8.

Because the Court erred in overruling Defendant's motion for a new panel of jurors, to which Defendant duly accepted.

9.

Because the Court erred in allowing the excess panel or holdover jurors to be mixed with the state's witnesses.

10.

Because the Court erred in admitting the records of previous convictions offered by the State, over Defendant's objection, to-wit:

"that the state failed to properly prove and identify the records as being valid and still enforceable and pertaining to this Defendant on trial, and still be valid and subsisting."

WHEREFORE, Defendant prays the Court that the verdict of the jury and the judgment of the Court be set aside and that he be granted a new trial herein.

s/ JAMES E. BUSH

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Order Overruling Motion for New Trial—May 25, 1961

ON THIS DAY Came on to be heard the motion of Defendant James E. Bush to set aside the verdict and judgment herein rendered and grant him a new trial of this cause, and the State being present in Court by her County Attorney, and the Defendant James E. Bush being present in Court in person, and the Court having heard the said motion and the evidence thereon submitted, is of the opinion that the same should be overruled. It is therefore considered, ordered and adjudged by the Court that the said motion for a new trial herein be and the same is overruled—and notice of appeal again given by defendant's attorney.

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Sentence—May 25, 1961

THIS DAY This cause being again called, the State appeared by her County Attorney, and the Defendant, James E. Bush was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judg-

ment herein rendered against him on a former day of
27 this Term; and thereupon the Defendant James E. Bush was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, James E. Bush to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT That the Defendant James E. Bush who has been adjudged to be guilty of Theft (Habitual) and whose punishment has been assessed by the verdict of the jury at confinement in the Penitentiary for life, be delivered by the Sheriff of Ellis County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and the said James E. Bush shall be confined in said Penitentiaries for life, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said James E. Bush is remanded to jail until said Sheriff can obey the directions of this sentence.

Affidavit in Lieu of Bond (Pauper's Oath)—Filed May 25, 1961

(Omitted in printing)

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28 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

Order for Court Reporter to Prepare Transcript and Statement of Facts—May 25, 1961

On this the 25 day of May, 1961, the above Affidavit having been presented to me, it is hereby Ordered that the Court Reporter of this Court make a transcript and a statement of facts of the preliminary insanity hearing and of the main trial in question-and-answer form and deliver same to the above named Defendant's attorney, BILLY J. MOORE.

29 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Court's Order for Certain Original Exhibits to Go Up in Record as Originals—Filed June 17, 1981

It being agreed by the attorneys for both the State and Defendant that certain original exhibits introduced in evidence go up in the record as originals without the necessity of retyping or recopying same,

It is therefore ordered, adjudged and decreed by the Court that State's Exhibits 1, 2 and 3 and Defendant's Exhibit 1 in the insanity hearing of the above styled and numbered cause and State's Exhibits 9, 10, 11, 12, 13, 14, 15 and 16 and Defendant's Exhibit 1 in the trial on the merits of the above styled and numbered cause be included in the statement of facts as original exhibits.

s/ A. R. STOUT
Judge Presiding

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion for Extension of Time—Filed July 15, 1981

Comes now JAMES E. BUSH, Defendant, and request the Court for an extension of time for the filing of the Motion of new Trial and for the amending of the Motion for new Trial according to Article 755 of Vernon's Annotated Code of Criminal Procedure of the State of Texas, and would show the Court the following:

(1) That the Defendant needs an extension of time in order to properly prepare the appeal of this case to the Court of Criminal Appeals of Texas, and that he has discovered new evidence pertinent to his defense in this case.

Wherefore premises considered the Defendant request that the Court grant him this Motion and extension of time for the filing of the original Motion for new Trial and the amended Motion for new Trial.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

Refused:

s/ A. R. STOUT
A. R. Stout

Date
7-15-61

On this the day of , 1961, came on to be heard the Motion of the Defendant, JAMES E. BUSH, being the Motion for Extension of Time for the filing of the original Motion for new Trial and the amended Motion for new Trial.

After hearing and considering the Defendant's pleadings, the evidence and support of same, and the arguments of his counsel, it is my opinion that the Defendant has satisfactorily shown to this Court that an extension of time for the filing of the original Motion for new Trial and the amended Motion for new Trial should be granted; and

It is ordered, judged, and decreed that the Defendant JAMES E. BUSH, is granted an extension of time for the filing of the original Motion for new Trial and it is further granted the extension of time to file an amended Motion for new Trial in the above cause, but such amended Motion for new Trial shall not be filed later than the day of , 1961.

A. R. STOUT

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion for Continuance—Filed July 24, 1981

Comes now the defendant, James E. Bush, in the above entitled and numbered cause and files his motion
31 for continuance and in support thereof would show the following:

The key witness in his defense, Bay Simms, is unavailable at the present time.

s/ BILLY J. MOORE
Attorney for Defendant

I will overrule it, to which defendant excepted.

s/ A. R. STOUT
Judge Presiding

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Objections to Court's Charge—Filed July 24, 1981

PRELIMINARY HEARING

Now comes the defendant and objects to the Court's charge for the following reasons, to wit:

The first objection is to the presumption, Paragraph 3, it mentions that the result of the judgment placed in evidence and the result of such judgment is to make it "presumptively appear," and we object on the grounds that "presumptively appear" does not correctly place the burden of the presumption, correctly state the burden of presumption, and that the word "appear" should be deleted.

We object to the statement contained in the 4th paragraph of the Charge in that it says that the test of present

insanity is at this time whether the defendant knows right from wrong in the nature and consequences of his acts. The correct Charge would be, "Does he know the nature and consequences of his acts and is he able to advise and assist his attorney in preparing a rational defense to the offense with which he is charged."

s/ Billy J. Moore

Overruled, to which defendant excepted

s/ A. R. Stout,
Judge

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32 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Objections to Court's Charge—Filed July 24, 1961

Comes now the defendant in the above styled and numbered cause and, after all evidence has been presented by both the State and the defendant but before the reading of the Court's Charge to the jury, makes the following objections to the Court's Charge, to wit:

We request that the Court's Charge be amended so that the first issue for the jury would be whether or not the man is insane or was insane at the time of the act and also whether or not he is insane at this time.

We further object to the Charge to the jury on the grounds of its definition of insanity at the present time and state that the jury should be charged to the effect that the test of insanity at the time of the trial is not the right and wrong test but whether or not, because of his previous mental condition, he is rendered incompetent to make a rational defense.

We would further object to the Charge in that it does not set out fully the law applicable to this proceeding; that is, it does not advise the jury as to the full nature and conse-

quences of their acts. I cite as an authority for that Jackson vs. State, which I haven't had time to read, which says that the Court will explain the law upon the subject applicable to the facts in evidence.

We further object to the Charge on the grounds it does not state what position the insanity judgment rendered on the preliminary hearing or what effect it has on this decision.

s/ BILLY J. MOORE

Overruled, to which defendant excepted.

s/ A. R. STOUT,
Judge

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33 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Motion to Quash—Filed July 24, 1961

Comes now the defendant in the above and entitled numbered cause and files this his motion to quash the jury panel on the basis of the fifteen new jurors selected to complete the panel, and all of these jurors are from Waxahachie, Texas, a town not familiar to the counsel for defense, and not a representative group of the County, and that such body should be selected by the jury commission.

s/ BILLY J. MOORE
Attorney for Defendant

I do overrule it.

s/ A. R. STOUT
Judge Presiding

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Defendant's Bill of Exception No. 1—Filed July 24, 1961

BE IT REMEMBERED, that upon the trial of the above entitled and numbered cause, the Court, in its written charge delivered to the jury, along with other instructions the following, to-wit:

"Upon the law of insanity, you are instructed that no act done in a state of insanity is an offense or punishable under our law. Every person is presumed to be sane until the contrary is shown by proof, and the burden of proof is upon the Defendant to establish his insanity by a preponderance of the evidence, but he is not required to establish such plea of insanity by any evidence beyond a reasonable doubt."

"In order for a person to be insane under the law,
34 his mind must be so affected or mentally diseased that his reason is dethroned to the extent that he does not know the nature, quality, or consequences of his act at the time, that is, he does not know the difference between right and wrong."

And the Defendant, before the Court's charge was read to the jury, presented his objection thereto, and the Court after considering said objection, overruled the same, which action and ruling of the Court, Defendant then and there in open Court excepted upon the ground that "Its definition of insanity at the present time" time of trial, and further stated that the jury should be charged to the effect that the test of insanity at the time of trial is not the right and wrong test but whether or not, because of his previous mental condition, he is rendered incompetent to make a rational defense.

And the Defendant herein now tenders his Bill of Exception No. 1, and ask that the same be approved, allowed,

signed by the Court, and filed as a part of the record in this case.

s/ Billy J. Moore
Billy J. Moore
Attorney for Defendant

The above and foregoing bill of exception is approved by the Court on this the 20 day of July, 1961, and ordered filed by the Clerk, with this qualifiaction: Reference is made to the complete record in the case.

s/ A. R. Stout
A. R. Stout,
Judge

(Title omitted)

Defendant's Bill of Exception No. 2—Filed July 24, 1961

Be It Remembered that after all evidence had been presented by both the State and the Defendant in the above entitled and numbered cause, but before the reading of the Court's charge to the jury, the Defendant made the following objection to the Court's charge, to-wit:

"We request that the Court's charge be amended so that the first issue for the jury would be whether or not the man is insane or was insane at the time of the act and also whether or not he is insane at this time.

We further object to the charge to the jury on the grounds of its definition of insanity at the present time and state that the jury should be charged to the effect that the test of insanity at the time of the trial is not the right and wrong test but whether or not, because of his previous mental condition he is rendered incompetent to make a rational defense.

We would further object to the charge in that it does not set out fully the law applicable to this proceeding; that is, it does not advise the jury as to the full nature and consequences of their acts.

We further object to the charge on the grounds that it does not state what position the insanity judgment rendered on this preliminary hearing or what affect it has on this decision."

And the Court after considering said objections overruled the same, to which action a ruling of the Court, the Defendant then and there in open Court excepted.

And the Defendant tenders this his Bill of Exception No. 2, and ask that the same be approved, allowed, signed by the Court, and filed as a part of the record in this case.

s/ Billy J. Moore
Billy J. Moore
Attorney for Defendant

The above and foregoing Bill of Exception is approved by the Court and ordered filed by the clerk.

s/ A. R. Stout
A. R. Stout,
Judge

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36 (Title omitted)

Defendant's Bill of Exception No. 3

Be It Remembered that after all evidence had been presented by both the State and Defendant, in the above styled and numbered cause, but before the reading of the Court's charge to the jury, in the preliminary hearing, the Defendant made the following objection to the Court's charge, to-wit:

"First objection is to the presumption, paragraph three, it mentions that the result of the judgment placed in evidence and the result of such evidence as to make it 'presumptively appear,' and we object on the grounds that 'presumptively appear' does not correctly place the burden of the presumption, correctly state the burden of presumption, and that the word 'appear' should be deleted.

We object to the statement contained in the fourth paragraph the charge in that it says that the test of

present insanity is at this time whether the Defendant knows right from wrong and the nature and consequences of his acts. The correct charge would be, 'does he know the nature and consequences of his acts and is he able to advise and assist his attorney in preparing a rational defense to the offense of which he is charged'."

And the Court after considering said objections overruled the same, to which action and ruling of the Court Defendant then and there in open Court excepted.

And the Defendant herein now tenders his Bill of Exception No. 3 and ask that the same be approved, allowed, signed by the Court, and filed as a part of th records in this case.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

37 The above and foregoing Bill of Exception is approved by the Court this the 20 day of July, 1961, and ordered filed by the clerk, with this qualification: Reference is here made to the complete record in the case.

s/ A. R. STOUT
A. R. Stout,
Judge

(Title omitted)

Defendant's Bill of Exception No. 4—Filed July 24, 1961

BE IT REMEMBERED that on the 24th day of April, A.D. 1961, the Defendant, JAMES E. BUSH, was scheduled to go to trial before a jury in the District Court of Ellis County, Texas, upon an indictment containing three counts of theft, but prior to said date to-wit: April 21, 1961, the Defendant filed and caused to be presented to the Court the following motion:

DISTRICT COURT OF THE 40TH JUDICIAL DISTRICT
ELLIS COUNTY, TEXAS

No. 10902

STATE OF TEXAS

v.

JAMES E. BUSH

Now comes the defendant in the above entitled and numbered cause and requests the Court to send the Defendant, JAMES E. BUSH, in this case to a mental institution for diagnosis and/or observation before he is placed on trial in this case and in support of such Motion would allege the following:

(1) That heretofore, to wit, on February 14, 1924, in the County Court, Navarro County, Texas, in case no. 3387, tried before a jury, in an Inquiry of Lunacy proceeding the court adjudged that the said JAMES E. BUSH was a lunatic and also ordered him to be conveyed to the lunatic asylum for restraint and treatment, and the said judgment has not been vacated or set aside.

(2) The Defendant, by his attorney, has reason to believe and does believe that the said Defendant is at the present time and was at the time of the commission
38 of the alleged offense an insane person.

(3) That the Defendant is an indigent person and does not have the necessary finances to provide himself with counsel for his defense and without the necessary finances to provide himself with the necessary psychiatric tests, examinations, and evaluations concerning his mental state of being.

(4) That without being sent to an institution for diagnosis and/or observation the Defendant will be denied the right to a fair trial and that he will not be able to adequately prepare his defense to the pending cause.

(5) That the proceedings now pending against the Defendant in the above entitled and numbered cause should be suspended until such time as his mental state of condition could be observed, diagnosed and evaluated.

(6) That because of his indigent condition he will be precluded from admission to a mental hospital according to the right given him under Article 932 b, Section 8 of the Texas Code of Criminal Procedure wherein it provides "no person shall be committed to a mental hospital under this chapter except on competent medical or psychiatric testimony," unless the Court provides him with competent medical or psychiatric observation, diagnosis and evaluation.

BILLY J. MOORE
Atttorney for the Defendant,
JAMES E. BUSH.

APPROVED: REFUSED: April 21, 1961

A. R. STOUT, *Judge,* to which the Defendant duly excepted.

BE IT FURTHER REMEMBERED that on the 24th day of April, 1961, the Defendant then and there in open Court, substantially requested the same Motion, and which Motion was refused by the Court, to which action of the Court the Defendant then and there excepted.

BE IT FURTHER REMEMBERED that in the Defendant's Motion for New Trial in the above cause on May 9, 1961, in paragraph three thereof, the Defendant urged this
39 same matter all of which the Court overruled, and to which action of the Court, the Defendant in open Court then and there excepted and gave notice of appeal to the Court of Criminal Appeals of Texas, at Austin, Texas, and now tenders this his Formal Bill of Exception No. 4 and asks that the same be approved, allowed, signed by the Court, and filed as a part of the record in this case.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

The above and foregoing bill of exception is approved by the Court on this the 20 day of July, 1961, and ordered filed by the clerk, with this modification and qualification:

The attorney for defendant had been appointed to represent the defendant some three weeks before said case had

been set for trial; and the County Health Officer, a skilled M.D., who had had psychiatric training, had thoroughly observed and evaluated the defendant and testified during the trial that he was sane.

The testimony showed that at the time of the Navarro County judgment of lunacy the defendant was under some two or three felony indictments and that he remained in a State Hospital a very short time and was finally released because he was sane at all times. To have granted defendant's motion would have required a continuance of the case which had long been set for trial.

At the pretrial insanity hearing the defendant introduced a specialist or expert of some sort from Dallas who testified that he was unable to tell whether the defendant was sane or insane from the limited time that he had had for investigation. However, no additional time was requested for said expert and he had ample time between the preinsanity trial and the main trial for any additional time he may have needed for a lunacy diagnosis, as testified to by him; but he was not called as a witness or offered as a witness by the defendant upon said main trial for any purpose. Reference is here made to the complete record in the case.

s/ A. R. Stout
Judge Presiding.

40 July 23, 1961

The defendant excepts to the Court's qualification of the defendant's bill of exceptions No. 4.

s/ Billy J. Moore
Attorney for Defendant

July 23, 1961

The defendant having excepted to the Court's qualification to his said Bill No. 4, said Bill No. 4, together with said qualification of the Court, is adopted as the Court's own bill of exceptions.

s/ A. R. Stout
Judge Presiding.

(Title omitted)

Defendant's Bill of Exception No. 5—Filed July 24, 1961

BE IT REMEMBERED that on the 24th day of April, A.D., 1961, the Defendant, JAMES E. BUSH, was scheduled to go to trial before a jury in the District Court of Ellis County, Texas, upon an indictment containing three counts of theft, but prior to said date, to-wit: April 21, 1961, the Defendant filed and caused to be presented to the Court the following Motion:

DISTRICT COURT OF THE 40TH JUDICIAL DISTRICT
ELLIS COUNTY, TEXAS

No. 10902

STATE OF TEXAS

v.

JAMES E. BUSH

Now comes the defendant in the above entitled and numbered cause and requests that the Court appoint and pay for a competent independent psychiatrist's services so that the Defendant can adequately prepare his defense to the above entitled and numbered cause; and for suspension of the above proceedings for a period of time sufficient to enable the psychiatrist to obsevre, diagnose, and evaluate the Defendant's mental condition, and in support would also allege the following:

(1) That heretofore, to-wit: on February 14, 1924,
41 in the County Court, Navarro County, Texas, in case No. 3387, tried before a jury in an Inquiry of Lunacy proceeding the Court adjudged that the said JAMES E. BUSH was a lunatic and also ordered him to be conveyed to the lunatic asylum for restraint and treatment, and the said judgment has not been vacated or set aside.

(2) The Defendant, by his attorney, has reason to believe and does believe that the said Defendant is at the present time, and was at the time of the commission of the alleged offense, an insane person.

(3) That Section 8 of the Article 932 b of the Code of Criminal Procedure of the State of Texas provides that

"no person shall be committed to a mental hospital under this chapter except on competent medical or psychiatric testimony" and that the Defendant is without the necessary finances to employ a competent independent psychiatrist to observe, diagnose, and evaluate his mental condition and that the Court does not provide him with such service he will be denied the right to admission to a mental hospital and will be denied the right to a fair trial because of his financial inability to provide himself with the necessary competent psychiatric testimony of this statutory provision.

BILLY J. MOORE
Billy J. Moore,
Attorney for Defendant,
JAMES E. BUSH

APPROVED:

REFUSED: April 21, 1961
A. R. STOUT, *Judge*, to which defendant duly excepted.

BE IT FURTHER REMEMBERED that on the 24th day of April, 1961, the Defendant then and there in open Court, substantially requested the same Motion, and which Motion was refused by the Court, to which action of the Court the Defendant then and there excepted.

BE IT FURTHER REMEMBERED that in the Defendant's Motion for New Trial in the above cause on May 9, 1961; in paragraph three thereof, the Defendant urged this same matter all of which the Court overruled, and to which action of the Court, the Defendant in open Court then and
42 there excepted and gave notice of appeal to the Court of Criminal Appeals of Texas, at Austin, Texas, and now tenders this has Formal Bill of Exception No. 5 and asks that the same be approved, allowed, signed by the Court, and filed as a part of the record in this case.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

The above and foregoing bill of exception is approved by the Court on this the 20 day of July, 1961, and ordered filed by the clerk, with this modification and explanation:

All of the qualifications to defendant's Bill of Exceptions No. 4 are here referred to, incorporated and adopted and the record in the case is referred to for all purposes. To have granted said motion would have necessitated a continuance of the case.

The defendant had had ample opportunity before trial for the observation, etc., and delay that he now complains about. He did introduce a posed expert at the preinsanity trial who testified that he could not say whether the defendant was sane or insane; and such witness, although he had had ample time for whatever diagnosis he cared to make, was not called as a witness at the main trial.

A competent doctor with psychiatric experience did observe and diagnose the defendant before trial, and testified that he was sane.

The lunacy judgment in Navarro County of many years ago was rendered when the defendant was under three felony indictments for theft; under which judgment he was sent to Terrell State Hospital, and after a short time he was released and pronounced sane at all times. Nothing showed the defendant to be insane and the Court had no fund or money for so-called psychiatrists, alienists, quacks or specialists.

A. R. Stout,
Judge Presiding.

July 23, 1961—Defendant excepts to the foregoing qualification.

s/ Billy J. Moore
Attorney for Defendant.

July 23, 1961—whereupon the Court adopts said fore-
43 going bill, together with the qualification, as the Court's bill of exceptions.

A. R. Stout,
Judge Presiding.

(Title omitted)

Defendant's Bill of Exception No. 6—Filed July 24, 1961

BE IT REMEMBERED that after the trial was had and completed in this cause, and after the jury found the Defendant, JAMES E. BUSH, guilty as charged in all three counts of the indictment, the Defendant filed and caused to be filed the following Motion for New Trial, to-wit:

DISTRICT COURT OF THE 40TH JUDICIAL DISTRICT
ELLIS COUNTY, TEXAS

No. 10902

STATE OF TEXAS.

v.

JAMES E. BUSH

NOW comes JAMES E. BUSH, Defendant in the above entitled and numbered cause, and moves the Court to set aside the verdict of the jury and the judgment of the Court rendered herein and grant him a new trial for the following reasons, to-wit:

1. Because the verdict of the jury regarding the insanity of the Defendant at the date of the trial and at the date of the alleged offense is contrary to the evidence, and the State failed to prove, beyond a reasonable doubt, with the evidence offered, that the Defendant was sane at the time of the alleged offense.

2. Because the Court erred in granting the motion of the County Attorney restraining the defense counsel from referring to the fact that the Defendant would go to the penitentiary for life if found guilty in this case; either on voir dire examination of the jurors, in argument to the jury, or in presenting evidence, to which motion the attorney for the Defendant strenuously objected and the Court overruled. Defendant's objection was on the grounds that the jury was entitled to know the nature and conse-
44 quences of its acts and that the jury was entitled to know the nature and consequences of its acts in finding the defendant sane at the time of the offense, sane at the time of the trial, and guilty of the charges. In this

connection, the Court's charge to the jury was erroneous and misleading in that it asked the jury to assess the punishment if they found the Defendant guilty of theft.

3. The Court erred in refusing to grant Defendant's motion that he be sent to a mental institution for diagnosis and/or observation before he was placed on trial.

4. Because the Court erred in rejecting the Defendant's motion for the appointment of a competent independent psychiatrist to enable him to adequately prepare his defense to the alleged charges; and for suspension of the proceedings for a period of time sufficient to enable the psychiatrist to observe, diagnose, and evaluate the Defendant's mental condition.

5. That the Defendant was denied his right to acquittal and right to a fair trial because of the Court's error in failing to appoint him adequate independent psychiatric services for the purpose of determining his sanity or insanity.

6. Because the Court erred in instructing the jury that, in effect, "the prior judgment of insanity, which was not vacated or set aside, made it presumptively appear that the Defendant was insane at the time of the occurrence of the alleged charges and at the time of trial, over Defendant's objection to the Court's instruction by objecting as follows: that the jury should be instructed that the Defendant having been once adjudicated insane by a jury, which judgment had not been set aside, or vacated, and which said judgment was properly introduced in evidence, was presumed to still be insane under the law.

7. Because the Court erred in its charge to the jury by its instruction giving the test for insanity at the time of the trial as being the right and wrong test, to which instruction and charge the Defendant duly objected,
45 and which objection was overruled, to which the Defendant duly accepted and requested the Court to submit the following instruction "You are instructed that 'insane' or 'insanity' is meant inability at this time by the Defendant to understand the difference between right and wrong and inability in mind to understand and appreciate the nature of the act charged against him in the indictment

and the consequences thereof, and inability of the Defendant in mind to make a rational defense concerning said act of defense.

You are instructed that if you do not believe, beyond a reasonable doubt, that the Defendant, a this time, is sane, so that he does not know right from wrong in nature and consequences of his acts and so that he is able to advise and assist his attorney in preparing a rational defense to the offense of which he is charged, you will find him insane and so state in your answer to the special issue submitted to you."

8. Because the Court erred in overruling Defendant's motion for a new panel of jurors, to which Defendant duly accepted.

9. Because the Court erred in allowing the excess panel or hold-over jurors to be mixed with the state's witnesses.

10. Because the Court erred in admitting the records of previous convictions offered by the State, over Defendant's objection, to-wit:

"That the state failed to properly prove and identify the records as being valid and still enforceable and pertaining to this Defendant on trial, and still be valid and subsisting."

Wherefore, Defendant prays the Court that the verdict of the jury and the judgment of the Court be set aside, and that he be granted a new trial herein.

s/ James E. Bush

Be It Further Remembered that on the 25th day of May, A. D., 1961, the Defendant presented and the Court read, heard and considered the above motion, all of which motion was by the Court overruled, and to which action of
46 the Court the Defendant then and there in open Court excepted and gave notice of appeal to the Court of Criminal Appeals of Texas, at Austin, Texas, and now tenders this his formal bill of exception No. 6, and

asks that the same be approved, allowed, signed by the Court and filed as a part of the record in this case.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

The above and foregoing bill of exception is approved by the Court on this the 20 day of July, 1961, and ordered filed by the clerk, with this explanation: The defendant filed the motion for new trial; but the Court does not certify to the truth of the allegations therein.

A. R. STOUT,
Judge Presiding.

(Title omitted)

Defendant's Bill of Exception No. 7—Filed July 24, 1961

BE IT REMEMBERED THAT on the 15th day of July, 1961, the following motion was filed and presented to the Court and considered by same on the 15th day of July, 1961. The said motion is as follows:

DISTRICT COURT OF THE 40TH JUDICIAL DISTRICT
ELLIS COUNTY, TEXAS

No. 10902

STATE OF TEXAS

v.

JAMES E. BUSH

MOTION FOR EXTENSION OF TIME

Comes now JAMES E. BUSH, Defendant, and request the Court for an extension of time for the filing of the Motion of new Trial and for the amending of the Motion for new Trial according to Article 755 of Vernon's Annotated Code of Criminal Procedure of the State of Texas, and would show the Court the following:

That the Defendant needs an extension of time in order to properly prepare the appeal of this case to the Court of

Criminal Appeals of Texas, and that he has discov-
47 ered new evidence pertinent to his defense in this case.

Wherefore premises considered the Defendant request that the Court grant him this Motion and extension of time for the filing of the original Motion for new Trial and the amended Motion for new Trial.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

REFUSED:
s/ A. R. STOUT
A. R. Stout

Date
July 15, 1961

To which refusal Defendant duly excepted in open Court.

BE IT FURTHER REMEMBERED that the Court read, heard, and considered the above motion, and overruled same, to which action of the Court the Defendant then and there in open excepted.

And the Defendant herein now tenders this his bill of exception No. 7, and asks that the same be approved, allowed, signed by the Court and filed as a part of the record in this case.

s/ BILLY J. MOORE
Billy J. Moore
Attorney for Defendant

The above and foregoing bill of exception is approved by the Court on this the 20 day of July, 1961, and ordered filed by the clerk with this explanation:

At the time the Court was presented with the motion referred to, the defendant's motion for new trial had already been overruled many weeks previous; notice of appeal had been given; a court term had passed, and no reason

intelligible to the court was given as a reason for the granting of said motion.

A. R. STOUT,
Judge Presiding

July 23, 1961—The defendant excepts to the court's qualification to b' bill No. 7.

s/ BILLY J. MOORE
Attorney for Defendant

48 July 23, 1961—The defendant having excepted to the foregoing bill No. 7, same, together with the court's qualification, is adopted as the court's own bill of exceptions.

A. R. STOUT,
Judge Presiding

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Index to Informal Bills of Exception Preserved in Question and Answer Statement of Facts to the Preliminary Hearing of Sanity—Filed July 24, 1961

1. Objection to the questions of the State's Attorney relating to the judgment of insanity. Page 7, lines 11-21.
2. Objection to State's Attorney testifying by means of a leading question. Page 10, lines 12-25.
3. Objection to the introduction in evidence of State's Exhibit Nos. 1, 2, and 3. Page 11, lines 14-line 9, page 12.
4. Objection to the testimony of the sheriff with regards to insanity of Defendant. Page 13, lines 16-line 13, page 14.
5. Objection to the testimony of the State's Attorney through a leading question. Page 31, lines 5-16.

IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

(Title omitted)

Index to Informal Bills of Exception Preserved in Question and Answer Statement of Facts—Filed July 24, 1961

1. Objection to the admitting in evidence bags purportedly containing the money stolen from the Haglers. Page 16, lines 7-20.

2. Same objection as number one. Page 17, lines 6-line 1, page 18.

3. Objection to the admission in evidence of testimony of the accused as given by the sheriff. Page 18, lines 22-line 7, page 19.

4. Same objection to evidence. Page 19, lines 7-line 5, page 21.

5. Objection to the admission in evidence by the sheriff incriminating the Defendant and which purportedly made by the Defendant. Page 21, lines 6-19.

6. Objection to the admission of evidence in State's exhibits 9, 10, 11, and 12. Page 31, lines 22-line 18, page 34.

7. Objection to the admission in evidence of State's exhibit 13 and State's exhibit 14. Page 40, lines 11-26.

8. Objection again to the admission in evidence of exhibits of the State, 13 and 14. Page 41, lines 1-23, page 42.

9. Objection to the admission in evidence of statements purportedly made by the Defendant. Page 51, lines 7-11.

10. Motion for suspension of proceedings; send the Defendant to a mental institution for observation; or an alternative, Court appoint a psychiatrist or a psychologist to examine and evaluate the mental condition of Defendant. Page 69, line 23-line 9, page 70.

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50 (Clerk's Certificate to foregoing transcript omitted in printing)

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51 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

STATE OF TEXAS

vs.

JAMES E. BUSH

Statement of Facts

COPY

FILED
at .....M.
Jul. 5, 1961
Mrs. Jake Talley
Clerk Dist. Court, Ellis County, Texas

FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
Aug. 7, 1961
Glenn Haynes
Clerk

52 JUDGE PRESIDING:

Honorable A. R. Stout
40th Judicial District
Ellis County, Texas

Transcript of Insanity Hearing—April 24, 1961

APPEARANCES:

For the State:

Bruce Allen, County Attorney
McGee Parramore, Assistant County Attorney
Ellis County, Waxahachie, Texas

For the Defendant:

William Moore
Ennis, Texas

. . . . . .

54 (Jury duly impaneled and sworn.)

(Indictment read to the defendant and to the jury by Bruce Allen.)

Mr. Moore: The defendant in the case Mr. Allen has read to you pleads not guilty. This is a preliminary hearing on the matter of whether or not the man was insane at the time the act was committed and whether or not he is in such a mental state at the present time that he cannot communicate with his attorney and put a rational defense on, as we have already told you. Now, we expect to prove by the evidence introduced here that the defendant is insane and that he is so beyond a reasonable doubt, even though we do not have to prove it beyond a reasonable doubt. We intend to show that he was insane at both times, at the time of the act and at the time of this date, at the time of this trial. If you will bear with us in this case, we will try to present enough facts so that you can come to a decision without burdening yourselves; that is, we want to try to show our case. We are not hiding anything; we want to let you know what he have got and if you feel like we are right, we want you to show it in your verdict. That is all we ask and all we will try to prove.

Your Honor, I call as my first witness Mr. Chestnut.

Your Honor, counsel for defense will move that the rule be invoked.

The Court: Well, let all of the witnesses stand up
55 and be sworn, all witnesses, State and defendant, all witness, all who expect to testify.

(Witnesses sworn by District Clerk.)

The Court: All right. All witnesses expect the ones waiting on the courtroom retire outside and be available so you can come in when your time comes. All right, proceed, gentlemen.

Mr. Moore: Your Honor, on this preliminary hearing, I would like to know, I notice they have been subpoenaed in the original proceeding, but if they are considered witnesses in this hearing, we would like to place them under the rule.

The Court: Well, have you called them as witnesses?

Mr. Parramore: I think they are walking out now.

The Court: Proceed, Counselor. I didn't understand that either one of you claim them as your witnesses.

HARRY F. CHESTNUT, after having been duly sworn, testified as follows:

Direct Examination by Mr. Moore

Q. Please state your name. A. Harry F. Chestnut.

Q. Mr. Chestnut, what do you do? A. I am the county clerk of Navarro County.

Q. In this position do you have custody and control of the records of this county? A. I do.

56 Q. Do you have custody and control of the lunacy proceedings in the Count of Navarro? A. Yes, sir.

Q. I show you an instrument here. Would you please state to the Court what this instrument is? A. That is the lunacy proceedings of James E. Bush, February 14, 1924, certified copy.

Q. Certified copy of the proceedings that you now have on file in Corsicana? A. Yes, sir.

Q. Now, I will ask you this, Mr. Chestnut, was this lunacy proceeding before a jury? A. Yes, sir, it was, yes.

Q. Would you please state for the benefit of the Court

his cause number here? A. Cause No. 33—Let's see—3387.

Mr. Allen: Your Honor, the record speaks for itself. If he introduces it, the record is there.

Mr. Allen: This is a certified copy of the record as you have it in your proceedings. We would like to show it to you.

Mr. Allen: Let's see it.

Offer in Evidence

Mr. Moore: We would like to offer this as Defendant's Exhibit No. 1.

(Certified copy of lunacy judgment marked for identification as Defendant's Exhibit No. 1, the original
57 of which exhibit accompanies this statement of facts.)

Q. Mr. Chestnut, I will ask you, you made a recent, diligent search of your records to determine whether or not this judgment has ever been vacated or set aside? A. No, sir, it has not. I examined the records, yes.

Q. When is the last time you examined the records as to whether or not it had been vacated or set aside? A. This morning, before I came over here.

Q. This morning before you came over here. With permission of the Court, we would like to pass this to the jury.

The Court: Very well.

Mr. Moore: I believe that is all I have of this witness.

Cross Examination by Mr. Allen

Q. Mr. Chestnut, do you have all the papers in that case? A. Yes, sir, surely do.

Q. I ask you to look at that instrument there and ask you to state what that is. A. That is a complaint in a lunacy.

Q. Is that the complaint that is in the same cause here, No. 3387, in Navarro County Court down there? A. Yes, sir.

Q. Now, who signed that complaint? A. T. F. Bush, it looks like.

Q. T. F. Bush? A. Yes, sir.

58 Q. How long have you been down at Corsicana? A. Oh, I have lived in Corsicana since '28, but I have been county clerk since '53.

Q. Well, you were not there then when this complaint was signed? A. No, sir.

Q. By one T. F. Bush? Now, this happened in 1924? A. Yes, sir, 13th day of February, is when this complaint was filed.

Q. Yes, sir. That was the 13th of February, 1924? A. That is right.

Q. Do you have a record showing who testified as witnesses in this cause? A. No, I don't.

Mr. Moore: Your Honor, I would like to say this, I feel there is no reason for this information to be brought in. The certified copy of the judgment has been admitted to be all right by the State's counsel. We were not aware that these other papers were there and we don't feel like these others papers have anything to do with the judgment itself. The jury found him to be insane.

The Court: Overrule the objection.

Mr. Moore: We except.

Q. Have you checked your record to find out—Normally you put some statement, do you not, by some witnesses? A. Yes, generally do.

Q. But you don't have it in this? A. I don't find
59 any except this T. F. Bush. I think he was the main man.

Q. He was the main man? A. Yes, sir.

Q. Now, you are not telling counsel or this jury—Do you know the defendant? A. I have seen him in Corsicana, yes, sir.

Q. You are not testifying, though, as to his being of unsound mind at all? A. No.

Q. You just brought the record up here? A. That is all.

Q. I see.

Mr. Moore: Are you through?

Mr. Allen: Yes.

Mr. Moore: I would like to see this original record, if I could.

Redirect Examination by Mr. Moore

Q. Mr. Chestnut, did the prosecuting attorney ask you to check the records to find out if this man was under indictment at the time this proceeding was filed? A. Yes.

Q. Did you find any? A. No.

Q. You did not find it? Was this man ordered to be committed to the lunatic asylum in this judgment?

60 Do you recall? A. Yes, Terrell.

Q. Would you please tell the Court what this judgment here is? A. That is a statement of the examination of him at the time before he was tried.

Q. Who was this statement prepared by? A. Frankly, I don't know. It must have been in the county judge's office. They generally take statements like this.

Q. Is this part of the proceedings? A. Yes.

Q. A part of the record? Do you have a certified copy of this? A. No.

Q. Have you prepared a certified copy of this for anyone? A. No, I have not.

Mr. Moore: We would like to admit this in evidence.

Mr. Allen: We object to this because it is hearsay.

The Court: Sir?

Mr. Allen: We object to this because it is hearsay.

The Court: Oh, I think it was—Overrule it.

Mr. Moore: All right, sir. Your Honor, on this, we will get a certified copy of this made downstairs before we admit it into evidence.

The Court: Well, you can show it to the jury, if you want to, now and save time.

Mr. Moore: I would like to get a copy of it if I could so they can take it into the jury room to deliberate with them.

61 The Court: Pass it to the jury, if you want them to see it. They can look at it and then you can get it copied later.

(Statement marked for identification as Defendant's Exhibit 2, the original of which exhibit accompanied this statement of facts.)

Mr. Moore: Your Honor, we are through with this witness.

The Court: Any more questions?

Mr. Allen: No, sir, I don't—

The Court: Stand aside, Mr. Chestnut.

Recross Examination by Mr. Allen

Q. Let me ask this one question. Do you know that this defendant was released from Terrell on November 14, 1924?

Mr. Moore: Your Honor, I object to that.

The Court: Overrule the objection.

Mr. Moore: We object to that.

A. I don't know.

Q. Did you know he was released over there, entered on the books that he was never insane? Did you know that? A. No, sir.

Mr. Moore: Your Honor, I object to that. Counsel is testifying. If he would like to get on the stand it would be fine.

The Court: Let him answer, if he knows.

A. No, sir.

Redirect Examination by Mr. Moore

Q. Let me ask you this, Mr. Chestnut, do you know,
62 did he go to Terrell? A. Oh this? Yes; yes.

Q. You said he was not released, but you didn't know whether he was released or not. Do you know whether or not he got away by some other means? A. No; I don't know.

Mr. Moore: Thank you, sir. That is all.

The Court: Call your next witness.

Mr. Moore: Your Honor, I would like to ask the Court to—Well, I will reserve that. We would like to reserve the right to rebuttal; however, we rest for the present time.

The Court: All right, the defendant rests. What says the State?

(Certified copies of Navarro County indictments marked for identification as State's Exhibits 1, 2, and 3, the originals of which exhibits accompany this statement of facts.)

Mr. Moore: We are going to object to this, Your Honor, on the basis it is not a bona fide part of the proceedings against the defendant and is not in issue here and is completely irrelevant.

The Court: What is it, Counselor?

Mr. Allen: Certified copies of indictments previous to this hearing.

The Court: Overrule the objection.

Mr. Moore: We except. Your Honor, we would like to further object to the introduction of this testimony on the ground it hasn't been properly proved up here today.

63

The Court: Let's see what you have, Counselor.

Mr. Allen: Certified copies, Your Honor.

The Court: Overrule the objection. Proceed.

Mr. Allen: I would like to read three instruments. The first one is—All three of them are indictments.

(State's Exhibit 1, State's Exhibit 3 and then State's Exhibit 2 read to the jury by Mr. Allen.)

Mr. Allen: Wayne McCollum.

WAYNE McCOLLUM, after having been duly sworn, testified as follows:

Direct Examination by Mr. Allen

Q. Give your name to the Court and jury, please. A. Wayne McCollum.

Q. Where do you live, Mr. McCollum? A. Waxahachie, 200 Franklin Street.

Q. How long have you lived in Ellis County? A. All my life, excepting a few years in service.

Q. What official position, if any, do you hold in the County at this time? A. I am sheriff of this county.

Q. How long have you been employed in that capacity? A. Four years and four months.

Q. All right. Previous to that time, did you hold any official position with the County? A. As deputy sheriff.

64

Q. Now, Sheriff, I will ask you if you know this defendant, James E. Bush? A. I do.

Q. How long have you known him? A. About October 22. I believe that is right.

Q. All right. On that— A. 1960.

Q. On that date, did you have occasion to observe this defendant, talk with him? A. Yes, sir.

Q. And subsequent to that date, have you had opportunities to observe him and talk with him? A. A number of times, yes, sir.

Q. Now and then, did you form an opinion as to the sanity of this person? A. I have.

Mr. Moore: Your Honor, I believe he ought to explain just what he means by insanity and furthermore give the basis for his actions and his opinion. A mere opinion alone, anybody can have an opinion. Let's have some basis for it before we start giving opinions. We object to the answer to that question.

The Court: I will let him answer. Overrule it.

A. I have.

65 Q. Tell the Court and jury whether or not in your opinion this person is of sound or unsound mind. A. I believe he is of sound mind.

Q. What would you say about on October 21, last year? A. The same.

Q. You say then— A. He is sane.

Q. —he was of sound mind at that time? A. Yes.

Q. Do you think he knew right from wrong on that date? A. I certainly do.

Q. You think he realized the consequences of his act? A. That is my opinion, yes, sir.

Mr. Allen: I believe that is all.

Cross Examination by Mr. Moore

Q. Wayne,— A. Yes, sir.

Q. You say you believe that this man possibly knows right from wrong and you have had a chance to observe him and, of course, being a peace officer, you try to disprove a man's guilt as well as prove his guilt, is that correct? A. Now, that I would come to prove the guilt—?

Q. You would spend as much time disproving his guilt as proving his guilt to make sure an innocent man is not brought— A. I have, yes, sir.

66 Q. Let me ask you this question here. If you had known that this man had been previously judged to be insane, would your opinion waver any at all or would you still have the same opinion? A. I would still have the same opinion because I didn't know anything about his record of being insane, and I just go by the time I observed him there, That is my opinion.

Q. Well, if there is an adjudication that he was insane by a jury of people, competent jurors, and they said the

man was insane and they further said it was hereditary, would this extra fact which you said you didn't know before, would that affect your decision on whether or not he was sane at the time? A. Not my belief of at the time. At another time he could have been, but that is my belief now.

Q. Wayne, what do you mean by "right and wrong"? Is it legally wrong, socially wrong, failure to adapt socially to society, morally, or what do you mean by "wrong" when you come to a conclusion? A. You mean in the criminal—?

Q. Could I ask you this question, do you mean that this man does not know right from wrong socially? A. I believe he knows right from wrong, anything he does. That is my opinion.

Q. Especially, legally, socially, morally and every other way? A. That is right.

Q. What do you mean by the word "know,"
67 Wayne? I realize this is technical, but what do you believe "know" means? A. Well, I am no psychiatrist.

Q. Does it mean just knowledge?

Mr. Allen: Judge, he is hypertechnical. This man is not qualified—

A. I could go get the dictionary and look it up.

The Court: Well, he asked him what k-n-o-w meant and I will let him answer, if he can make it any plainer to him.

Q. We are not trying to get you to be a psychiatrist. You are interested in telling what you know here. What we want to get at is this: in your opinion, you said the man was sane at the time he committed the act and you said he was sane at the present time. Now, you had some facts upon which to base this opinion. What are those facts? A. I have talked with Mr. Bush a number of times. I can talk with him the same as you and I are talking and never has there been a time, in the number of times that I have talked with him, he has never indicated in any way that there was anything mentally wrong with him. He just talked with us just like you and I would be talking. That is the way I base my—If a person is mentally off, he is going to wander; that is my opinion.

Q. Being sheriff, have you ever had any experience with the paranoid type of person who is insane? That is, today they look perfect; tomorrow they may kill you? A. Sure.

68 Q. Now, Wayne, from your observations, do you feel like this man is the type that could fit in with society from his actions down there in the jail? Does he mix with the others or does he stay away from them? A. He mixes with the other inmates.

Q. Would you say a man of normal mind would have some concern about how he looks and how he is kept? A. Knowing the prisoners down there at the jail, they are helter-skelter; they don't care too much. In fact, you have just to keep constantly on them all the time to even get them to clean up. They lay there with their feet on the bunks and I have to keep all the time trying to get them to clean up.

Q. Did you do that with Mr. Bush? A. Just generally speaking, the whole group. They are in a battery there.

Q. Did you do it with Mr. Bush? A. Not say, "Mr. Bush; you clean up."

Q. Did you see Mr. Bush recently in regard to his personal appearance? Did you say anything to him recently? A. Well, I have made him shave. He asked for a razor to shave.

Q. Wayne, did he have a pretty big beard on him at the time? A. Yes, sir, he did.

Q. How long would you guess he had been growing this beard? A. I don't know.

69 Q. Two weeks? A month? A. He had had this beard, oh, I'd say, just roughly guess, maybe a month or something like that.

Q. That was prior to the time I came into the case, so I didn't have anything to do with him cutting it off or leaving it on? A. That is right.

Q. Wayne, you only observation that you have had has been in the jail, is that correct? A. We have been with him a number of times out in the car going to different places with him on this case. I even rode with him to Hearst and out to Mr. Hackler's, to Fort Worth, a number of times in the car with him.

Mr. Moore: I believe that is all.

Redirect Examination by Mr. Allen

Q. Sheriff, when this defendant came into the Ellis County Jail, was he shaved? A. Yes, sir.

Q. Talking about whiskers, this man, this man won the Oscar, Peter Ustinov, with whiskers, didn't he? A. I believe that is right.

The Court: Call your next witness.

Mr. Allen: Captain Gilbert, I believe, at this time. Well, let's have Dr. Compton at this time then.

DR. JOHN COMPTON, after having been duly sworn, testified as follows:

70 Direct Examination by Mr. Allen

Q. You are Dr. John Compton? A. Yes.

Q. You live here in Waxahachie? A. Yes, I do.

Q. What is your business, Doctor, or profession? A. Physician.

Q. How long have you been practicing medicine? A. Six years.

Q. Now, would you just tell the jury what education you have had? A. I went to Baylor University in Waco for four years; University of Texas Medical School in Galveston.

Q. What about internship?. A. Internship in New York City.

Q. Have you practiced anywhere else other than Waxahachie? A. No, six years in Waxahachie.

Q. All right. Dr. Compton, have you seen this defendant, James Edward Bush? A. Yes, I have.

Q. When was the first time you saw him? A. I saw him first in November, November 3 of last year, 1960, in my office, and I saw him again last week, April 21, at the jail.

Q. All right, sir. And at that time I will ask you, after examining him, I will ask you if you formed an opinion as to whether or not he was of sound or unsound mind?

71 A. I felt that he was of sound mind.

Q. All right. As to October 21, last year, would you say he was of sound or unsound mind? A. Of sound mind. At the time he was orientated as to time and place and person.

Q. Now, you went back to see him, what date? A. The 21st of April.

Q. All right. At the time you examined him again, and based on both the examinations that you made and the observation that you had, do you have an opinion as to whether or not today he is of sound or unsound mind? A. I still felt he was of sound mind. The only difference in the two were, at the time of the last examination, instead of giving me specific answers, he would say that he didn't remember.

Mr. Allen: I see. I see. All right, I believe that is all.

Cross Examination by Mr. Moore

Q. Doctor, I will try to be as brief as I can on this, but I believe that you have had probably more opportunity to observe this defendant medically than anyone else, so we would kind of like to talk with you about some of it. What type of examination did you give him when he was brought to your clinic? I believe you said you examined him then.
A. At that time just took the history from him and exam-
ined him as far as his mental capacity, if he was ori-
72 entated and if he was having any difficulty with any
hallucinations, seeing or hearing voices, which he denied at that time, that he had had no hallucinations.

Q. Doctor, what kind of test—You just—It was a consultation, is that what you had with him? A. Yes.

Q. You didn't run any tests on him physically or anything else? A. No; no.

Q. Doctor, do you know of the man's criminal record? A. No, I do not.

Q. Did you know that he had been previously adjudged by a jury to be a lunatic? A. The only thing, I know that he told me that he had been in Terrell, in a mental hospital, several years ago—I don't know the date of that—and at that time all he received was psychotherapy. He did not have to have any electric shock treatments.

Q. Let's see, Doctor. On this, what would heredity have to do with it? Is insanity something that possibly heredity—? A. There can be a tendency to inherit it; insanity itself is not inherited, but a tendency toward it.

Q. Based on the decision of the jury in this particular case in Corsicana, they found him to be suffering, found

it to be hereditary. Now, when you made your opinion as to sanity or insanity, did you know about this particular judgment here? Had you seen it or did he go into it with you? Did he mention anything about it being hereditary? A. No. I have not seen that judgment.

Q. Doctor, are there different forms of insanity? A. Yes, there are.

Q. I show you the judgment here. There are the questions, issued asked the jury, if they found him insane, I believe that is number one; then they mentioned they found it to be hereditary. This was in 1924. Now, on the evaluation of this man, of course, the jury found it to be hereditary and they also found him to have about fifteen spells of insanity. Would that have affected your decision in any way? A. What do the physicians at the hospital say?

Q. At this hospital here? I don't know. I haven't written them; I have written them a letter but I haven't received a response from them. A. The jury decision would not affect me unless I had some word from the psychiatrists that treated him.

Q. I show you this statement prepared there. Would you examine that? Now, Doctor, I ask you, does this here put any light on your decision or would it affect your decision as an additional fact? A. What is the date on that?

Q. This was in 1924 also. Would this, if you had knowledge of this at the time you examined him, these facts stated in here, would that have affected your decision? A. Not at the present time if he has had no difficulty since 1924.

Q. Well, now, you mentioned that there are varying degrees of insanity, are there not? A. Yes, different types.

Q. Well, now, what do you—Are you applying the legal rule of insanity here? That is, know the difference between right and wrong? A. Yes.

Q. Is that the same test applied by doctors in a situation such as this? A. Being of unsound mind, that they don't understand reality.

Q. Doctor, if a man—Assume a man has been convicted approximately twenty-three or four times of offenses related to theft. Would that fact of the evidence of a klepto-

maniac affect your decision in any way? I mean, let me ask you this question, if he is a kleptomaniac, is that a disease of the mind? A. Yes, sir, kleptomania is.

Q. It is a disease of the mind. What is kleptomania? A. It is their inability to keep from stealing. They will steal things they don't need.

Q. They will steal thing they don't need. Well, are they—we will just have to follow through this—Are they a type of hardened criminal? A. Not really a hardened criminal; they are just unable to resist stealing anything.

75 Q. Is this a defect of the mind? A. Of the emotional status itself; not necessarily of the brain structure itself.

Q. If a person—Let me ask you this: Can he then have a criminal intent? If he is a kleptomaniac, can he have criminal intent? A. Well, stealing is criminal itself. He might steal—

Q. That is the act, but the intent before the act. A. As far as stealing to make it a crime?

Q. The State has alleged in their primary offense that he fraudulently took it away, that he had the criminal mind; but if he had any kleptomania tendencies, then before he commits the act, is he mentally defective? A. In kleptomania, it usually is not. They see something; they take it. But usually they don't plan crimes.

Q. They don't plan them. What do they do after they get through with it, after they get the stuff? A. Usually take it home and leave it, and they don't use it.

Q. They don't try to hide it, sell it? Let me ask you this question: After they take it home with them, they are not like a hardened criminal, a person of sane mind, they don't take it out and try to sell it or hide it or dispose of it? A. No, they leave it.

Q. Let's go back to this question again: If a person is a kleptomaniac, is he mentally defective? A. Emotionally defective.

76 Q. Doctor, in view of the fact that there is so much psychoneuroses and psychiatry and all this other stuff, would you explain what you mean by "emotional" to the jury?" A. Emotion rather than, in converse, of him having any damage to the brain. Of course, your emotions

come from the brain, and it is their—actually it is their feelings, their thinking processes, rather than like a tumor of the bran or anything, the thinking processes that is deranged.

Q. The thinking processes Doctor, I have a little information here from a book I would like to show you here, "Lawyers Medical Encyclopedia," prepared by a number of lawyers, doctors and psychiatrists, and it mentions in here under "Psychoneuroses," and makes the following statement, that "It can be caused by organic means, that is—" Wait just a minute and I will find it for you. I'd like to ask you if this sort of thing could come about by something wrong with his physical body, his actions. A. Okay.

Q. Under the section—I will show you this here—under the section of "Psychoneuroses," it says, shows various types, obsessive compulsive reactions, then it says over here, "Majority of individuals with obsessive, compulsive reactions are not criminal. Certain individuals with compulsions however, become criminal because of the morbid compulsion to steal—," kleptomania, pyromania, eromania. These things originally, it says that they were caused
77 by some sort of organic trouble, by maybe possibly an injury to the head or arteriosclerosis or whatever they call it or some other organic problem, there is a possibility of that causing it. Do you agree with the opinion on that? A. Of course, if he had a head injury, I would think that he would have been showing it. As far as some mental tendency, if he had some, or some changes in his thinking back in 1924, usually those are progressive processes, and especially arteroisclerosis, which is hardening of the arteries, which starts early and progressively gets worse.

Q. What about typhoid fever? A. It could.

Q. Doctor, if a man were suffering from this type of an ailment in 1924, what would be the possibilities of being cured, say of the incontrollable emotion? A. Oh, the disease certainly would be cured by now or he would have shown progressive changes, if he got any mental deterioration.

Q. Let's say kleptomania, for instance. If he was suffering from kleptomania in 1924, could that have been cured

or would it have been cured up to date? Could it have been cured? A. It could have been curred with psychiatric help.

Q. Psychiatric help. Now, if this man were convicted or charged with approximately 24 crimes during his lifetime, all related to theft, every cotton-picking one of them
78 related to theft, would you say that is a good indication that he has this emotional disturbance you are talking about, kleptomania? A. Not necessarily.

Q. If the evidence were to show that he did not try to hide the bounty of the act after he committed the act or he seemed unconcerned about it, would that affect your decision on him being possibly emotionally upset? A. If he stole routinely and fairly regularly. That is, as far as kleptomania, they would be stealing continuously, things that they did not need. The 24 thefts has been in what? Nearly forty years?

Q. But it is always something they don't need? A. Usually it is. I mean, they don't steal maybe one time a year and not go back. Kleptomaniacs, they go routinely to stores and just will pick up items they don't even need. The don't steal necessarily money because they need it for food, or clothes because they have no clothes. They will go in and steal maybe fine things, jewelry or things like that, and then just put it up and they never use it or need it. But it is not just that they do it maybe every year or two.

Q. Let me show you some indictments introduced in evidence. I notice one of them says that this man here, this defendant, stole a bale of cotton. I believe he stole a bale of cotton. Is this the type of thing that you are saying he probably didn't have any use for? A. Unless
79 he stole it so that he could sell it to get money that he needed.

Q. Well, this is the type of object, of course, that is very difficult to conceal. Doctor, if this man is a kleptomaniac, he can't control himself and he can't keep from stealing, then it is your opinion that he could be cured by proper psychiatric treatment? A. Yes.

Q. Where would he get such psychiatric treatment? A. From here, it would be Terrell State Hospital.

Q. Terrell State Hospital. Let me ask you again, can he keep from acting that way? Can a kleptomaniac keep from acting that way? Has he got to steal? A. A kleptomaniac has to steal.

Q. You said, of course, his actions originally start with the brain? A. With his thinking process.

Q. So that in a sense he is mentally defective, if such is true? A. If it is true. As I say, I don't find him mentally defective. Q. All right. Doctor, in your examination, what type of questions did you ask him? What would you have reference to? A. As to his name, his birthdate, his age—see if they correspond his age with the right year—and as to the location where he is, the place, the time and the date, the month, the year; generalities, as who is President of the United States, Governor of Texas; his past
80 medical history, if he has had any serious illnesses, typhoid fever being the only one he gave; as far as any hallucinations, hear voices, seeing things that were not actually there; as far as any paranoid tendency of everybody being against him or any threats to him; as far as his schooling, how far he went to school; simple mathematical problems to see if he was able to keep a train of thought; just questions to test his mental ability of thought processes.

Q. Doctor, when you examined him the last time, did he seem to show a lack of concern for his own personal appearance? A. Well, I think most of them do in jail, but at the time he was unshaven. Now, when I was by to see him, he was clean shaven at that time.

Q. I will ask you this question: Do you think a person who is mentally deficient would be more likely to show a lack of concern for his personal appearance? A. Usually they do.

Q. They don't seem to fit in well with society and really don't care. Is that kind of the general opinion? A. Yes.

Q. Doctor, do you believe that a more thorough examination should be made of this man by a psychiatrist or psychologist to really determine the depth of it, the possibility? A. I do not feel it is necessary, but, of course, that is up to the Court.

Q. Of course, your training did not include psychi-
81 atry, is that correct? A. Yes, we have psychiatry.

Q. Is it specialized? A. Not specialized, no, sir.

Q. What additional training do they have? A. They have anywhere from four to six more years training in psychiatry.

Mr. Moore: I believe that is all.

Redirect Examination by Mr. Allen

Q. Doctor, you examined this fellow and you told the Court and jury that you thought he was of sound mind, both on October 21 and as of today? A. Yes.

Q. Now, counselor asked you several questions about kleptomania. I will ask you if, in your opinion, this man is a kleptomaniac? A. I don't feel that he is.

Q. He asked you about a bale of cotton. Obviously he wasn't raised on a farm or he would know a bale of cotton could be sold for lots of money. A. That is right.

Q. Would a man steal to get money? A. Yes.

Q. Talking about people who usually steal, everybody that steals is not a kleptomaniac, are they? A. No.

Q. And I will ask you this question, if most people
82 who steal don't steal because they don't want to work? A. Yes.

Q. And most of them aren't kleptomaniacs, are they? A. No.

Q. Did this man tell you that he was released from the Terrell State Hospital? He told you he had been over there? A. Yes.

Q. Did he also tell you that they entered on his record over there that he never was insane? A. No.

Mr. Moore: Your Honor, I object to this as being hearsay.

The Court: I will let him answer. A. He did not tell me.

Q. He did not tell you that? A. No.

Q. In other words, Doctor, if you had—You would have to have some information from medics after they examined him before you would say he was of unsound mind? True? A. Well, as I say, I felt that at the present time he is of sound mind, and if he was of unsound mind back then, I would have to have some medical record.

Q. And the mere fact that a jury of six men in the

County Court of Navarro County said he was of unsound mind back in 1924 wouldn't affect your opinion one iota on October 21? A. Not one bit, no.

83 Q. What about if he had three indictments against him just preceding the time he was found insane and the complaint was signed by a person by the name of Bush? Would you have any opinion as to why he went to Terrell back there in 1924, in your opinion? A. I would not feel—

Mr. Moore: Your Honor, I don't think the doctor should be put such a question as that. Mr. Allen has already admitted that judgment as being valid.

The Court: I don't think so. I think the jury are as smart as the attorneys and the doctor on that matter.

Mr. Allen: I withdraw it.

The Court: I don't believe it is in the realm of expert testimony.

Mr. Allen: All right, sir. I believe that is all.

The Court: Stand aside, Doctor.

Mr. Moore: That is all, Doctor. No more questions.

Mr. Allen: Captain Gilbert.

The Court: How many more witnesses do you have, Counselor?

Mr. Allen: Judge, about two or three more.

The Court: Well, how quickly can you get the jury some lunch?

Mr. Moore: Your Honor, in view of this, I would like to make the motion that the Court recess in order to allow a doctor we have got to examine this man and who

84 hasn't had the opportunity before, to check with him possibly over the lunch hour. He just came in.

The Court: Rush it up, Counselor. How long will it take you to get the jury their dinner?

The Bailiff: Probably forty-five minutes at least, Judge.

The Court: Well, under the law you must remain together until the trial is concluded. The bailiff will take you out to lunch and we will recess until 12:45, so follow the bailiff here.

(Court was in recess. After recess the following proceedings were had:)

The Court: Call your next witness.

The Court: Captain Gilbert.

DALTON L. GILBERT, after having been duly sworn, testified as follows:

Direct Examination by Mr. Allen:

Q. State your name, please, sir. A. Dalton L. Gilbert.

Q. Where do you live, Mr. Gilbert? A. I live at 201 Hurstview Drive, Hurst, Texas.

Q. How long have you lived up there? A. At this address, about two years.

Q. Where is Hurst? A. Well, it is on Highway 187 between Fort Worth and Dallas.

Q. What official position, if any, do you hold in
85 Hurst, with the city? A. I am with the police department. I am captain of the police department.

Q. How long have you been with the police department in Hurst? A. Over six years.

Q. Continuously? A. Yes, sir.

Q. I will ask you if you know this defendant, James E. Bush, sitting there at counsel table. A. Yes, sir.

Q. I will ask you, during your time over in Hurst if you have had an opportunity to observe this defendant? A. Yes, sir.

Q. Talk with him and so forth? A. Yes, sir.

Q. I will ask you, Captain Gilbert, if you have an opinion as to whether he was of sound or unsound mind on October 21, last year? A. Well, on October 21, I had no contact with the man on that particular date.

Q. Well, you knew him back there at that time? A. Yes, sir, I knew him then.

Q. Did you not have an opportunity to talk with him, observe him, before or after that date? A. Oh, yes, sir, before that date and after that date.

Q. Do you have an opinion as to whether or not
86 he was of unsound mind? A. Well, to me, yes, sir, he did.

Q. You believe what? What was that opinion? A. I believe he was of sound mind.

Q. All right, sir. Have you talked with him since that date? A. Yes, sir.

Q. Without going into any of the questions relating to any crime at all, I want to ask you what discussion, if any, did you have with this defendant on or about October—

Mr. Moore: Your Honor, I have to object to this. I believe that this is against the Constitution of Texas. He hasn't said he warned the defendant and that anything he might say would be used against him. I have to object to that. The Constitution doesn't allow it, I don't believe.

Mr. Allen: Well, I withdraw it.

The Court: All right, sir.

Mr. Allen: That is all.

Mr. Moore: I don't believe I have any questions.

The Court: Stand aside.

Mr. Allen: Willis Cox.

WILLIS COX, after having been duly sworn, testified as follows:

Direct Examination by Mr. Allen:

Q. State your name, please. A. Willis Cox.

87 Q. Where do you live, Mr. Cox? A. Waxahachie.

Q. How long have you lived in Waxahachie? A. Twenty five years.

Q. What official position do you hold at this time with the County? A. Deputy sheriff.

Q. How long have you held that position? A. Since 1937.

Q. Previous to that time, had you held any position with the County, and if so, when? A. Yes.

Q. When, and what? A. Three or four years prior to that—let's see—with the County Farm.

Q. Prior to that? A. Yes, sir.

Q. Any other position that you have held? A. Not prior to that with the County.

Q. You never were jailer or deputy sheriff before that? A. No, sir.

Q. Any with the city? A. Four years since 1937, I was with the Waxahachie Police Department.

Q. I see. All right. Now, Mr. Cox, do you know

88 this defendant, James E. Bush? A. Yes, sir.

Q. How long have you known him? A. Since October 22, last year.

Q. I see. Now, since you have known him, have you had an opportunity to observe him, see him and talk with him? A. Yes, sir.

Q. I will ask you if you formed an opinion as to whether or not he is of sound or unsound mind. A. Yes, sir, I have.

Q. All right. Would you just tell the jury and the court what that opinion is? A. Well, my opinion is that he is of sound mind.

Q. Did you form an opinion as to whether or not he was of sound or unsound mind on October 21 of last year? A. Yes, sir.

Q. What was that opinion? A. Well, my opinion is that he was of sound mind at that time.

Mr. Allen: I believe that is all.

Cross Examination by Mr. Moore:

Q. Mr. Cox, you are a deputy sheriff now? A. Yes, sir.

Q. I don't believe I have any further questions.

Mr. Allen: That is all.

The Court: Stand aside.

Mr. Allen: The State rests, Your Honor.

Mr. Moore: Your Honor, I would like to call to
89 the stand in rebuttal Dr. Dyal.

The Court: Proceed.

DR. JAMES A. DYAL, after having been duly sworn, testified as follows:

Direct Examination by Mr. Moore:

Q. Will you please state to the Court your name. A. Dr. James A. Dyal.

Q. Dr. Dyal, where do you reside? A. In Dallas.

Q. Dallas. What do you do and what is your profession? A. I am assistant professor in psychology at Southern Methodist University.

Q. Where did you go to school. A. Undergraduate work at the University of Oklahoma and doctorate, Ph. D. work at the University of Illinois.

Q. While you were at the University of Illinois, did you have any training in psychological or clinical work dealing with mentally deranged persons? A. Yes, I spent a year and a half in the University psychological clinic and University counseling bureau.

Q. What was the nature of the clients problems in this hospital? A. It was not a hospital; it was an out-patient clinic. Well, they ran the gamut, from students with edu-

cational problems to students with problems in stuttering,
things of that sort, to family problems, emotional
90 problems, obsessions, compulsions, and then the
psychoses, or, to use the legal term, insanity.

Q. You did deal with insanity and you dealt with it in criminals? A. Not at this clinic; I didn't see that kind of patient at this clinic.

Q. Now, Doctor, do you spend full time teaching at S.M.U.? A. My full time job is teaching at S.M.U., but I am also in parttime private practice in Dallas.

Q. Who is this with, Doctor? A. Dr. Gladys Brown.

Q. What sort of practice? A. This is a practice concerned with emotional problems of children and adults.

Q. Doctor, have you written any articles or things for journals pertaining to the psychological field? A. Yes, I have several journal articles published in psychological journals.

Q. So that I, as well as the jury,—I don't know exactly myself what psychology is—would you explain to the Court what a psychologist is? Give a definition; what his function is. A. All right. Perhaps the best thing I can say here is that the psychologist is trained as an expert in human behavior; essentially, what makes people tick, why people do the things that they do, how they come to learn to do the things that they do, and what motivates them to do the things that they do. As a result, we are concerned
with not only normal behavior, but also with dis-
91 turbances of behavior, which often get people into
trouble with the law or in trouble with society in one way or another. The training, perhaps, would give some indication as to the kind of things that we do, the kind of training that we have. Basically, we are trained in understanding the psychology of motivation, psychology of learning. We are interested and trained in diagnosis of mental disorders and treatment of mental disorders, through counseling and psychotherapy.

Q. Doctor, you have examined this defendant, Mr. Bush, is that correct? A. That is correct.

Q. Would you state your examination is adequate? A. My examination is not adequate.

Q. Let me ask you this: A man—This is a preliminary trial of insanity prior to the main trial for the commission

of an offense or habitual criminal charge. Now, of course, we are interested in his sanity at two periods of time, today and his insanity at the time of the alleged commission of the offense, in October; and we are also interested in this man's ability to consult with his attorney and prepare a rational defense, that is, his ability to communicate, have a clear mind and communicate with his lawyer. Now, would you state from your examination whether or not you could give an opinion one way or another about this man's mind or his mental condition, his insane condition?

92 A. I saw the man for approximately twenty minutes in an interview, and on the basis of that interview, I could not make a statement with regard to your question.

Q. Doctor, we are dealing with the mind here of an individual. What would you consider as an adequate examination to come to a conclusion, the truth of the matter, as to whether the man is insane or not? What would you consider to be an adequate examination by either a psychiatrist or a psychologist? A. I think you have hit the point there. In a very large degree, the adequacy of any psychological examination is going to depend on the training of the person who makes the examination, and there are two professions that are specifically and extensively trained to make this kind of examination; the two professions are that of psychiatrist and that of psychologist. In any situation of this sort, where we are concerned with the sanity or insanity of a person, a lay person, such as you, in the extreme cases of insanity it would be very easy to tell that there was something wrong with this person, but typically the problem isn't that easy. Typically it is not this clear cut and as a result the specific training of the psychiatrist and the psychologist is necessary to make the discrimination as to whether or not the person is sane or insane. The specific kind of examniation that would be made, either by a psychiatrist or a psychologist, would have, of necessity, several features to it. The diagnosis decision. The

93 psychiatrist or the psychologist would be concerned in his interview about determining the relationship between the person's emotions and his behavior. For example, he would be very concerned about what his dominant motives are, what his dominent emotions are and whether or not he is able to control these emotions; whether or not

he has an antisocial emotion or motive, one that goes against society; is he able to control this or does he have to act on it. Another thing that we would be very concerned about determining is what we might call his thinking ability. First we would try to determine his level of intelligence or level of thinking ability, and this could be adequately done only by the administration of a psychological test of intelligence. This cannot be satisfactorily done by interview. Secondly, in addition to determining what we might call how intelligent he is, is he bright enough to know the difference between right and wrong, is he bright enough to be able to control his emotions. We would also be concerned about what we might call the confusion or organization of his thinking processes; is he able to take a thought and develop it to a logical conclusion or does he get mixed up and go off on all sorts of tangents, which represents a very confused way of thinking. Another area we would be interested in is how the person thinks about himself. Does he think that he is a strong person, a weak person. How does he feel about the motions that he has and the motivations that he has. Does he feel he can control them? What kind of person is he
94 from his point of view? Another area that we would be concerned with in any adequate evaluation would be does he perceive the world around him in essentially a normal fashion, as you and I might, or does he distort what is around him. The extremes of this would be such distortions as seeing things or hearing things that aren't there. We call these delusions and hallucinations. Specifically, hallucination is when he sees things that aren't there; delusion is when a person thinks something that is obviously not true. You and I would know it is not true; everyone would know it is not true. He may have the delusion that someone is trying to kill him, putting glass in his food, or people are listening to him constantly. This is the kind of thing that would be determined in this part of the examination. Another and very frequently used part of such an examination, one which takes a relatively short time to determine, would be whether or not he is in contact with reality as far as time and space is concerned, and the questions you might ask here would be does he know who he is; does he know where he is and why he is

there; does he know what year this is; what year he was born; what time of day it is; what season it is; does he know something about what is going on in the world around him; does he know who the President of the United States is; does he know what the colors are in the American flag; things of this sort. This is used when there isn't time, or for other reasons, for a more complete examination, but in my experience, this does not give an adequate indication of the person's mental state because we have all of these other things to consider. A person who is hallucitory, who is seeing things that aren't there, may very well at the same time know who he is, where he is, who the President of the United States is, or all of these kinds of orientation ideas. I think I would say that in terms of—to sort of summarize my thinking about what an adequate examination would have to be—timewise it would be one that would have to consume two or three hours of a psychiatrist's or a psychologist's time in talking with this person, and not only in talking with him but giving him psychological tests of his mental status. So often, in the cases that are not clear cut, just talking to the person is not satisfactory, because you and I know that we can function on a level with each other every day where we never let people know what we are really thinking and what we are really feeling. So much of our behavior—We were talking about perceptions, the way we see the outside world is determined not only by what is out there but also by what is inside of us, and our psychological tests, such as the ink blot test, give you an opportunity to give this person something that he doesn't know what it is; what he perceives is not determined by what is out there; it is determined by what is inside of him. And without this kind of information, a person may very well fool you on the basis of a verbal interview.

95

96 Q. Doctor, this information and summary, brief questioning, a man's name, how many children he has, President of the United States, would be strictly one part of your test? It would just show that the man is in this world and reality, possibly? A. It would show just that, that he knows who he is, how many children he has, things of this sort. It may or may not mean that in other

facts of his life he is, to use the term, in contact with reality.

Q. Doctor, I would like to show you a copy of the judgment of insanity rendered by the County Court in Navarro County and direct your attention to the response that the jury made to the issues submitted to them and that they stated there that they found insanity to be hereditary. Would this come into your, affect your decision? Is this a common sort of thing? A. The question of whether or not insanity is hereditory or not, the best we can say for it at the present time is we don't know, and a judgment of this sort, as a psychologist, I could not make a statement on it.

Q. Doctor, if this man—Assuming that the evidence showed that this man had been charged with numerous crimes, 23 or 24 or something like that, and they had all been related to theft, there was no charges of murder, rape, robbery, anything like that, they were all with regard to theft, would you say that then he could possibly be a kleptomaniac? A. When you use the word "possibly", I would have to say possibly, I would have to agree possibly,
97 but you would need a great deal more evidence to indicate whether he was or not. But it is possible.

Q. Does a kleptomaniac, then, have any use for the bounty? A. No, typically a person who is a kleptomaniac steals because he cannot keep from stealing and does not attempt to turn whatever he steals into gain for himself.

Q. Is a person who is a kleptomaniac medically or psychologically—not legally—is he a mentally ill person? Does he have a mental defect? A. A person who is a kleptomaniac is a mentally ill person.

Q. Can he be cured by proper treatment? A. There are several successful cases in the literature of the cure of kleptomania, but by no means all such cases are successfully treated.

Q. Doctor, after your examination, could you—I am not asking you to express an opinion one way or another about sanity or insanity—but did you, from your examination of him, did you see any symptoms or any evidence here, did you see any symptoms of possible mental illness, mental defect? A. I would have to answer that by saying no and saying this, that within the brief examination that I was

able to give him, it would not be possible, in my opinion, for any person to make a decision of that sort.

Q. Since the decision, legal decision, McNaughton's Rule of right and wrong test, 1843, has the science of the mind increased, or have they, has it boomeranged or exploded like science in the rest of the fields, like in medicine? Has the science of the mind also increased? A. Yes. Since the McNaughton rule there has been perhaps an unparalleled increase in our understanding of the human mind, of human behavior. Most specifically, especially, this has come about because of our concentration on motivations of people, and especially those motives of which we ourselves are not aware, those motives of which we are unconscious. They can determine our behavior just as directly, in some cases more directly, than those motives of which we are conscious.

98

Mr. Moore: I believe that is all I have.

Cross Examination by Mr. Allen:

Q. Dr. Dyal, how do you spell that? A. D-y-a-l.

Q. Those initials? A. J. A. James A.

Q. All right, sir. In listening to you, Doctor, I take it that you didn't have time enough to examine, time enough in your examination to form any opinion— A. That is correct.

Q. —as to whether this man is of sound or unsound mind. The question was asked as to whether or not this man was a kleptomaniac. You found nothing there at that time on this examination which would indicate that he was a kleptomaniac, but you went further and said you didn't have time to examine him, is that true? A. Yes, sir. Nothing to indicate whether he was or was not.

99

Mr. Allen: I believe that is all.

Mr. Moore: I believe that is all we have.

Mr. Allen: This further question, Doctor: Do you know Billy Moore? A. I met him today.

Q. For the first time? A. Yes, sir.

Q. Have you been subpoenaed down here? A. No, sir.

Q. You expect to be paid for coming? A. I expect to have my gasoline expenses.

Mr. Allen: Thank you, sir.

Mr. Moore: Would you mind—That is all right.

The Court: Stand aside.

Mr. Moore: Your Honor, I would like to call to the stand now Mr. Hackler.

L. C. HACKLER, after having been duly sworn, testified as follows:

Direct Examination By Mr. Moore:

Q. Would you please state your name to the Court? A. Leslie Hackler.

Q. Where do you live, Mr. Hackler? A. Ovilla.

100 Q. Do you know this defendant here, Mr. Hackler? A. I do.

Q. How long have you known him? A. About two and a half or three years.

Q. How well do you know him? A. Well, he worked for me a couple of different times, a couple of months the first time and about four the last time.

Q. Did he live in your house? A. He did.

Q. Did he have a free run of your premises? A. He did.

Q. Now, I direct your attention to October, approximately October 10, 1960, the date of the alleged offense. Was he living in your home at the time? A. October 10? Uh huh.

Q. Now, Mr. Hackler, as you know, he is charged with theft now. I believe you understand, of course, that is theft from you of a certain sum of money. You, of course, didn't know anything about any theft up until the time you lost your own money? A. No.

Q. Now, Mr. Hackler, did you have an opportunity to observe the defendant, his conduct, during this two and a half year period? A. I did.

101 Q. And his actions? A. I did.

Q. Mr. Hackler, would you please state to the Court your opinion whether this man was insane or mentally unsound at the date of the alleged offense in October? A. Well, if he was insane, I wouldn't have let him stayed in my house; that is, if I had thought so. I think he knew right from wrong.

Q. Mr. Hackler, let me call your attention, if I can, to Saturday, this previous Saturday. Do you recall talking to me? A. I did.

Q. Now, where were we when we had our conversation? A. We were at Ovilla and also here at the courthouse.

Q. The first time was in Ovilla. Where? A. At Lawson's Cafe.

Q. You related to me there, if you recall, that, of course, you didn't know any of these things were stolen until after the evidence come in and you didn't know anything about it, but will you please relate to the Court some objects that this defendant brought into your home. Did he bring in a lawn mower? A. He did.

Q. Did he say he had purchased it? A. No, said it was his daughter's.

Q. Did he work on it out in his front yard, out in your front yard? A. He did.

102 Q. Could anyone have seen him working on this if he was driving by your house? A. Oh, yeah.

Q. Did you tell me he brought in some tools? A. He brought those tools when he came there originally.

Q. Did he try to hide them any way or try to sell them? A. Not that I know of.

Q. Did he bring some saddles there? A. Two. I never did see but one until after this came up.

Q. Did he try to sell those? A. Not that I know of.

Q. Now, did he bring some gates to your house, some aluminum gates? A. Four.

Q. Four aluminum gates. When he brought these gates to your house, did he put them in the barn and try to hide them in any way? A. Left them in his pickup for a couple of days.

Q. He didn't try to hide them. Where was the pickup situated? A. Out in the driveway, right beside the driveway.

Q. Could anyone have seen these had they been passing by? A. Oh, yeah.

Q. Did he try to sell these gates? A. Not that I know of.

Q. Did he bring in some trash cans? A. Three.

103 Q. Did he, to your knowledge, have any obvious use for those trash cans? A. I don't know what he intended to do with them at all.

Q. Did he try to sell them? A. I don't think so.

Q. He, of course, had no use for them at your house, is that correct? A. No.

Q. You and your wife let him have the run of the house? A. Uh huh.

Q. Did he bring some scaffolds to your house? A. Several of them; I don't know how many.

Q. Where did he say he got those scaffolds? A. I don't think he said where he got them; he said he used them on a house moving project; he said he had been working on a house moving project when he came to my place.

Q. Would you describe these scaffolds? A. I would say they are two metal squares, each one higher than this table, and you put one on top of the other to build it on up to work on the side of a building.

Q. Did he try to sell these? A. Not that I know of.

Q. He was working for you at the time of the alleged offense? A. (Witness nods head.)

Q. Did he have any apparent use for it? A. Not that I know of.

104 Q. Did he try to sell it? A. No.

Q. Did he try to hide it? A. No.

Q. You are closer to him than anybody. I ask you, Mr. Hackler, you knew, of course, that he had been to Huntsville one time before? A. I knew he had been once, yes.

Q. But you were willing to give him a chance? A. Oh, yeah.

Q. Now, you paid him for his work, did you not? A. Yes, sir.

Q. And he had a place to sleep? A. Yes, sir.

Q. And he had plenty of food? A. I hope.

Q. As far as you knew, he didn't need anything, at least the necessities of life? A. That is right.

Q. You treated him with kindness. Now, I will ask you, after you discovered that this man had been charged with numerous offenses related to theft, did you express an opinion to me at that time that you thought something was wrong with the man's mind? A. I probably did. I made that statement even about a neighbor sometimes, but I wouldn't say there was anything.

105 Q. But you did make a statement to me that he was mentally unsound? A. I believe I said I didn't believe he was of a right mind; I believe that is the way I put it.

Mr. Moore: That is all.

Cross Examination By Mr. Allen:

Q. You have talked to this defendant since the commission of the offense? A. Bush?

Q. Yes, sir. A. Yeah, in the jail.

Q. Did he tell you why he took your money? A. He apologized.

Q. What did he say the reason was? A. Oh, he was drinking.

Mr. Allen: I believe that's all.

Redirect Examination By Mr. Moore:

Q. Mr. Hackler, on these previous occasions when he brought in the trash cans and things, was he drinking then? A. I don't know. As a rule, he would come in after dark with those things.

Q. If he had been that type of man, he brought some of it in during the daytime? A. Those days, I'd say it was a little before dark when he brought those in.

Q. Am I to assume that he acted fairly reasonably? I mean, he wasn't unruly?

Mr. Allen: We object to that, "am I to assume," the way he puts the question.

The Court: Sustain the objection.

Q. Of course, you know what we are trying to get to here. You did tell me Saturday that you thought the man was of unsound mind? A. I think I made that statement.

Mr. Moore: All right. That is all we have. Thank you.

Recross Examination By Mr. Allen:

Q. Mr. Hackler, do you think this defendant knew right from wrong when he took your money? A. I do.

Q. All right. I believe that is all.

Mr. Moore: I believe that is all we have, Your Honor. We close.

Mr. Allen: We don't have any more.

The Court: Both of you finished?

Mr. Allen: Yes, sir.

107 STATE OF TEXAS
COUNTY OF ELLIS

I, Mary Cave, official court reporter of the 40th Judicial District of the State of Texas, do hereby certify that the above and foregoing 56 pages of typewritten matter constitute a transcript of the evidence, in question and answer form, in the insanity hearing in the cause of The State of Texas vs. James E. Bush, No. 10902, in said court; and I do further certify that such transcript is true and correct.

Witness my hand this 15th day of June, 1961.

/s/ MARY CAVE

APPROVED:

Attorney for State

/s/ BILLY J. MOORE
Attorney for Defendant

/s/ A. R. STOUT
Judge Presiding

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108 **State's Exhibit 3**

109 In the Name and by the Authority of the State of Texas:

THE GRAND JURORS for the County of Navarro, State aforesaid, duly selected, organized, impaneled and sworn as such at the October Term, A. D. 1923, of the District Court of the Thirteenth Judicial District, in and for said county, a quorum thereof being present, upon their oaths present in and to said Court that Edward Bush, alias T. C. Wilson on or about the 11th day of September, A. D. 1923, and anterior to the presentment of this Indictment, in the County and State aforesaid, did then and there unlawfully and fraudulently take one bale of cotton of the value of $100.00, same being the corporeal personal property of W. A. McClintock, from the possession of the said W. A. McClintock, without the consent of the said W. A. McClintock and with the intent to deprive the said W. A.

McClintock of the value thereof, and with the intent to appropriate it to the use and benefit of him, the said Edward Bush, alias T. C. Wilson, against the peace and dignity of the state.

And the Grand Jurors aforesaid upon their oaths aforesaid in and to said Court do further present that Edward Bush alias T. C. Wilson on or about the 11th day of September, A. D. 1923 and anterior to the presentment of this Indictment in the County of Navarro and State of Texas, did fraudulently receive from a person whose name is to the Grand Jurors unknown and did fraudulently conceal, certain property, to-wit, one bale of cotton, the same being the property of W. A. McClintock, and the same being of the value of $100.00; which said property had been theretofore acquired by another in such manner as that the acquisition thereof come within *theeabing* if the term theft, and the said Edward Bush, alias T. C. Wilson, then and there received and concealed the said property knowing the same to have been so acquired,

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4-24-61

against the peace and dignity of the State.

/s/ W. H. Hastings
Foreman of Grand Jury

110 File No. 11,051

THE STATE OF TEXAS

vs.

EDWARD BUSH, alias
T. C. Wilson

Witnesses:
W. A. McClintock
D. A. Bradshaw
Allan Seale
S. J. McKinney

INDICTMENT

Theft and Receiving and concealing stolen property

_____ County Attorney

A TRUE BILL

/s/ W. H. HASTINGS
Foreman of Grand Jury

Filed on the 26th day of October 1923

J. S. HARLEE
Clerk of District Court
Navarro County, Texas

By J. R. CURINGTON Deputy

Amount of Bail, $_____

THE STATE OF TEXAS
County of Navarro

I, WALTER MCDANIEL, Clerk, District Court of Navarro Co. Texas do hereby certify that the above and foregoing is a true and correct copy of Indictment in the above numbered and styled cause, as the same appears from the original now on file in this office.
TO CERTIFY WHICH, I have hereunto subscribed my name and affixed my official seal, at Corsicana, Texas, this the 22 day of April, A. D. 1961

WALTER MCDANIEL Clerk
District Court Navarro County, Texas
By /s/ DORA LEE STEELMAN Deputy

(SEAL)

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111 **State's Exhibit 1**

112 In the name and by the Authority of the State of Texas:

THE GRAND JURORS for the County of Navarro, State aforesaid, duly selected, organized, impaneled and sworn as such at the October Term, A. D. 1923, of the District Court of the Thirteenth Judicial District, in and for said county, a quorum thereof being present, upon their oaths present in and to said Court that Edward Bush on or about the 1st day of July, A. D. 1923, and anterior to the presentment of this Indictment, in the County and State aforesaid, did then and there unlawfully and fraudulently take one automobile of the value Two hundred and fifty ($250.00) Dollars, same being the corporeal personal property of Harry Jefferson, from the possession of the said Harry Jefferson without the consent of the said Harry Jefferson and with the intent to deprive the said Harry Jefferson of the value thereof and with the intent to appropriate it to the use and benefit of him, the said Edward Bush, against the peace and dignity of the state.

And the Grand Jurors aforesaid upon their oaths afore-

said, in and to said Court do further present that Edward Bush on or about the 1st day of July, A.D. 1923, and anterior to the presentment of this indictment, in the County of Navarro and State of Texas, did fraudulently receive from a person whose name is to the Grand Jurors unknown, and did fraudulently conceal certain property, to-wit: one automobile the same being the property of Harry Jefferson and the same being the value of Two Hundred and Fifty ($250.00) Dollars; which said property had been theretofore acquired by another in such manner as that the acquisition thereof comes within the meaning of the term theft and the said Edward Bush then and there received and concealed the said property knowing the same to have been so acquired

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4-24-61

against the peace and dignity of the State.

/s/ W. H. Hastings
Foreman of Grand Jury

113 File No. 11049

THE STATE OF TEXAS

vs.

Edward Bush

Witnesses
HARRY JEFFERSON
JOE MCELROY
TOM SMITH

INDICTMENT

Offense: Theft and Receiving and Concealing Stolen Property

_____ County Attorney

A TRUE BILL

/s/ W. H. HASTINGS
Foreman of Grand Jury

Filed on the 26th day of October 1923

/s/ J. S. HARLEE
Clerk of District Court
Navarro County, Texas

By J. R. CURINGTON

Amount of Bail, $_____

THE STATE OF TEXAS,
County of Navarro.

I, WALTER McDANIEL, Clerk District Court, of Navarro Co. Texas do hereby certify that the above and foregoing, is a true and correct copy of Indictment in the above numbered and styled cause, as the same appears from the original now on file in this office.

TO CERTIFY WHICH, I have hereunto subscribed my name and affixed my official seal, at Corsicana, Texas, this 22 day of April, A.D. 1961.

WALTER McDANIEL Clerk
District Court Navarro County, Texas

(SEAL)

By /s/ DORA LEE STEELMAN Deputy

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114 **State's Exhibit 2**

115 In the Name and by the Authority of the State of Texas:

THE GRAND JURORS for the County of Navarro, State aforesaid, duly selected, organized, impaneled and sworn as such at the October Term, A. D. 1923, of the District Court of the Thirteenth Judicial District, in and for said county, a quorum thereof being present, upon their oaths present in and to said Court that Edward Bush alias T. C. Wilson on or about the 11th day of September, A. D. 1923, and anterior to the presentment of this indictment, in the County and State aforesaid, did then and there unlawfully and fraudulently take one motor truck of the value of One Thousand ($1000.00) Dollars, same being the corporeal personal property of P. Seale, from the possession of the said P. Seale, without the consent of the said P. Seale, with the intent to deprive the said P. Seale of the value thereof, and with the intent to appropriate it to the use and benefit of him, the said Edward Bush alias T. C. Wilson, against the peace and dignity of the State.

And the Grand Jurors aforesaid upon their oaths aforesaid in and to said Court do further present that Edward

Bush, alias T. C. Wilson on or about the 11th day of September, A. D. 1923, and anterior to the presentment of this Indictment in the County of Navarro and State of Texas did fraudulently receive from a person whose name is to the Grand Jurors unknown and did fraudulently conceal, certain property, to-wit: one motor truck, the same being the property of P. Seale, and the same being of the value of One Thousand ($1000.00) Dollars; which said property had been theretofore acquired by another in such manner as that the acquisition thereof comes within the meaning of the term theft, and the said Edward Bush, alias T. C. Wilson, then and there received and concealed the said property knowing the same to have been so acquired,

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4-24-61

against the peace and dignity of the State.

/s/ W. H. HASTINGS
Foreman of Grand Jury

116 File No. 11050

THE STATE OF TEXAS

vs.

Edward Bush, alias T. C. Wilson

Witnesses:

P. SEALE
ALLEN SEALE
MR. GROUSE
D. A. BRADSHAW

INDICTMENT

Offense: Theft and receiving and concealing stolen property

_____County Attorney

A TRUE BILL

/s/ W. H. HASTINGS
Foreman of Grand Jury

Filed on the 26th day of October 1923

J. S. HARLEE
Clerk of District Court
Navarro County, Texas

By J. R. CURINGTON Deputy

Amount of Bail $ _____

THE STATE OF TEXAS
County of Navarro

I, WALTER MCDANIEL, Clerk District Court, of Navarro Co. Texas do hereby certify that the above and foregoing, is a true and correct copy of Indictment in the above numbered and styled cause, as the same appears from the original now on file in this office.

TO CERTIFY WHICH, I have hereunto subscribed my name and affixed my official seal, at Corsicana, Texas, this the 25th day of April A. D. 1961

WALTER MCDANIEL, Clerk
District Court Navarro County, Texas

(SEAL)

By /s/ DORA LEE STEELMAN Deputy

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117 **Clerk's Note re Defendant's Exhibit 1**

Certified copy of lunacy judgment in Cause No. 3387, State of Texas, vs. James E. Bush, in the County Court of Navarro County, Texas, was also introduced in evidence in the trial of this cause No. 10902 in the 40th Judicial District Court, and accompanies the exhibits in that statement of facts.

118 **Defendant's Exhibit 2**

119 STATEMENT

1. Name of patient James Edward Bush.
2. Where born In Grimes Co. Texas.
3. Residence near Cisco County of Eastland.
4. Age 24 last brithday Feb. 9, 1924.
5. State as to marraige Not married.
6. Number and age of children No children.
7. Occupation of patient Oil field worker.
8. Occupation of father farming
9. Natural disposition quiet & peaceful
10. Habits in health, as to temperance, etc. temperate
11. Education—very little.
12. Religion—Christian.

13. Age of first attack—17 yrs.
14. Insanity—how manifested—Melancholy & apparent loss of reason.
15. Number and duration of attacks—about 15—lasting about 1 week.
16. What relatives similarly affected—a cousin, an uncle & nephew.
17. Supposed cause-remote—Typhoid fever.
18. Supposed cause-recent—Unknown.
19. Duration of present attack—about 6 mos.
20. State as to sleep—poor.
21. Appetite for food—poor.
22. State or bodily health—poor.
23. Whether subject to epilepsy—no.
24. Any faltering of speech or loss of power—Does not talk at all.
25. Present habit and propensities—Melancholia & despondency.
26. What delusions—Unknown—Simple seems to have lost all feeling or rational thought.
27. Whether suicidal—attempted or threatened—and how Yes.
28. If dangerous to others—how—Yes—simply because of lack of responsibility.
29. Postoffice address of nearest friend and degree of relationship—T. F. Bush; Route 2; Cisco, Texas.
30. Maiden name of mother Sarah Jane Weaver.
31. Name of father Tundy Freeman Bush.
32. Other particulars

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4-24-61

120 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS
40TH JUDICIAL DISTRICT

No. 10902

STATE OF TEXAS

Vs.

JAMES E. BUSH

Statement of Facts

Filed
at M.
JUL 5 1961
Mrs. Jake Talley
Clerk Dist. Court, Ellis County, Texas

FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
AUG 7 1961
GLENN HAYNES
Clerk

121 Honorable A. R. Stout
40th Judicial District
Ellis County, Waxahachie, Texas

Transcript of Trial—April 25, 1961

APPEARANCES:

For the State:
Bruce Allen, County Attorney
McGee Parramore, Assistant County Attorney
Ellis County, Waxahachie, Texas

For the Defendant:
William Moore
Ennis, Texas

122 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

STATE OF TEXAS

vs.

JAMES E. BUSH

123 **Statement of Counsel for Defendant**

(Jury duly impaneled and sworn.)

(Indictment read to defendant and then to Court and jury by Mr. Parramore.)

Mr. Moore: I previously said that I am Bill Moore, an attorney from Ennis, and I represent Mr. Bush in this cause.

The State has read you their indictment against this defendant of two previous thefts and one allegedly committed on October 21. I am not supposed to say something here and I don't know how to say it except this, I have been precluded on it except this: I would say this is what you call an habitual criminal charge. I guess that is as far as I can go.

All right. The State is going to put on a number of witnesses to try to prove not only that this defendant committed this theft but that in all probability to rebut our testimony, our evidence that the man is insane, not only at the present time but at the time that the alleged offense was committed. We, of course, are pleading not guilty to the theft; we are pleading not guilty also by reason of insanity, and we are also pleading that this man is insane at the present time and is unable to competently consult with his attorney to put up a rational defense; and, of course, the test of sanity or insanity is right or wrong, but that is our contentions, what we expect to prove.

We only have probably two or three witnesses, and the purpose of this jury here, of course, is justice and
124 truth, and without the truth there can be no justice, of course, but I want to say this: My purpose here is to try to present to you the defendant's side of the case after the State has presented theirs. Not that we have

to; he doesn't have to get on the stand at all, and he shouldn't have to—

Mr. Allen: Your Honor, he stated the defense, but now he is giving them the law.

The Court: I believe you have stated your pleading, Counselor. Sustain your objection. This is not the time for a speech or an opening statement. The State reads the indictment; you plead not guilty.

Mr. Moore: We plead not guilty by reason of insanity at the time of the commission of the offense, and we plead insanity at this particular time and we expect to prove that.

The Court: Call your first witness.

Mr. Allen: Mr. L. C. Hackler. Judge, did you want all the witnesses to be sworn?

The Court: Well, they were sworn yesterday.

Mr. Allen: All right, sir.

The Court: That is, some of them were. I don't know about all of them.

L. C. HACKLER, after having been duly sworn, testified as follows:

Direct Examination By Mr. Allen:

Q. Give your name to the Court and jury, please.
125 A. L. C. Hackler.

Q. Just keep your seat, Mr. Hackler. That is all right. L. C. Hackler. Where do you live, Mr. Hackler? A. Ovilla.

Q. Now, is your home in Ellis County or Dallas County? A. Ellis County.

Q. How long have you lived out there? A. Twelve years, I believe.

Q. What is your business or profession? A. I am a retired postal employee.

Q. Where did you work previous to moving out there? A. Dallas.

Q. Now, Mr. Hackler, I will ask you if you know the defendant, James E. Bush? A. Uh huh.

Q. How long have you known him? A. Approximately three years.

Q. Where was he staying on or about October 21, last year? A. With me.

Q. Was he living in your home with you? A. In my home.

Q. Who lives there with you? A. My wife.

Q. And he was staying in your home at that time. What was he doing, now, Mr. Hackler? A. He was working for me.

126 Q. I see. Now, do you and your wife have any side line hobbies? A. Well, we were collectors of old coins.

Q. All right, sir. How many coins did you all have on or about October 28? What was the value? A. You mean the value?

Q. Yes, sir. A. We had approximately $600.00 worth.

Q. Now, would that be—You mean the actual value of it? A. Face value.

Q. What would it be worth as coins, collector's items?

Mr. Moore: Your Honor, we object to this. The testimony should be from some expert on the value of the coins, if they are old coins. I don't know what the value is and I don't feel that would be proper.

The Court: I don't know that I perceive—

Mr. Moore: My objection is that Mr. Hackler isn't competent—

The Court: I understand your objection. Are you charging the defendant with—

Mr. Allen: No, sir, we are not. I just asked the value of it. Withdraw the question.

The Court: Yes, sir.

Q. Now, you say the face value was how much? A. Approximately $600.00.

Q. Where did you have those coins there in the house? A. In a small, green safe about so high.

127 Q. Safe? A. Cabinet. In other words, it was made out of metal.

Q. Tin? A. Heavy tin.

Q. Heavy tin. And what color? A. Green, I'd call it.

Q. Did you have these coins in that metal cabinet? A. I did.

Q. I see. When did you miss those coins, if you did? A. It was late in the afternoon around five or six o'clock.

Q. Was the defendant Bush in your home on that date?

A. As far as—He was—I don't believe he was there during that day that I saw him.

Q. You didn't see him there that day? But he was living there with you at that time? A. Uh huh.

Q. Was your wife there on that date? A. Well, she had gone to work and was gone to work all day.

Q. What does she do, Mr. Hackler? A. Designer of ladies clothes.

Q. In Dallas? A. Dallas.

Q. Was she in with you on this coin collecting? A. Oh, yeah.

Mr. Allen: I believe that is all.

Mr. Moore: Your Honor, we would like to pass
128 this witness at the present time.

The Court: All right.

Mr. Moore: And have the right to recall him.

Mr. Allen: Bobby Light. That is all, Mr. Hackler.

BOBBY LIGHT, after having been duly sworn, testified as follows:

Direct Examination By Mr. Allen:

Q. State your name, please. A. Bobby Light.

Q. Where do you live, Mr. Light? A. Hurst, Texas.

Q. How long have you lived there? A. I have lived there for three years.

Q. What official position, if any, do you hold with the City of Hurst? A. I am a police officer for the City of Hurst.

Q. Do you know this defendant, James E. Bush? A. Yes, sir.

Q. Did you have occasion to see him on or about October 22 of last year? A. Yes, sir.

Q. What was that occasion? A. I arrested Mr. Bush at 132 Myrtle Drive in Hurst.

Q. At the time of the arrest, did you make any
129 search or do anything else? A. Yes, sir, I did.

Q. What, if anything, did you find? A. I found a coin collection in his pick-up.

Q. And what did you do with those coins? A. I took the coins and took them to the police department, locked them in a safe to which I am the only one that has the key to it.

Q. Then, after that, what did you do with it? A. Eleven o'clock that night, October 22, I turned the money over to Sergeant Gilbert, personally. He took the money and locked it in his desk and that is the last I seen of it.

Q. Let me ask you this, is he a sergeant? A. He is a captain now. At the time he was a sergeant.

Mr. Allen: I believe that is all.

Cross Examination By Mr. Moore:

Q. I'd like to have a copy of this indictment. I lost mine somewhere. Mr. Light, you have testified that you are from Hurst and you are a police officer there. A. Yes, sir, that is correct.

Q. And that you have seen this defendant here. A. Yes, sir.

Q. Now, let me know, what time was it that you picked him up? A. It was six p.m.

Q. Six p.m. in Hurst? A. Yes, sir.

130 Q. October 21? A. October 22, 1960.

Q. This act is alleged to have been committed on the 21st day of October. Mr. Light, you said that there was some coins in the truck? A. Yes, sir, that is correct.

Q. How much did you find still to be there or was there? A. I don't know the exact amount; I didn't count them. There was several hundred dollars worth, I would suppose.

Q. Several hundred dollars? A. Approximately. Like I say, I didn't count it. I wouldn't have any idea exactly how much it was.

Q. Then would you say that there were at least two hundred dollars there? You say "several." A. I'd say that—I wouldn't say there was at least two hundred dollars there. Like I say, I didn't count it. I don't actually know how much was there. I would say there was over a hundred dollars in coins.

Q. Your statement of several hundred dollars, you don't know really? A. No, sir. I stated before I didn't know exactly how much was there.

Q. Well, is it customary to count this money in a case such as this? A. At the time I had a prisoner in custody and over a hundred dollars worth of coins: pennies, dimes,

nickles and so forth. I am sure you would under-
131 stand it would take quite sometime to count that money.

Q. Yes, that is right, it would. Now, Mr. Light, when you arrested this defendant, did he tell you—What sort of condition was he in? A. Well, he was in a normal condition, I would say. Talked very nice. We had a conversation on the way to the police department, talked about the weather and so forth.

Q. Does he appear to you to be a hardened criminal, from your observation of him there?

Mr. Allen: Your Honor, we object to that. It calls for a conclusion and he is not an expert in that, anyway.

The Court: Sustain it. A. What was the ruling?

Mr. Allen: He sustained it.

Q. You turned this money over to Captain Gilbert, now, is that correct? A. Yes, sir, that is correct.

Mr. Moore: I believe that is all right now.

Redirect Examination By Mr. Allen:

Q. Mr. Light, you say you took this money and you turned it over to Captain Gilbert, or sergeant at that time. Is that the only money that you turned over to him on that day, the money that you took off this defendant? A. The money that I took out of his truck.

Q. That is what I mean. A. That is the only money we had any dealings with.

132 Q. That day? A. Yes, sir.

Q. That week? A. Yes, sir.

Q. And did you turn it all over to Sergeant Gilbert at that time? A. Yes, sir.

Q. All that you took out of the truck? A. Yes, sir.

Mr. Allen: I see. I believe that is all.

Redirect Examination By Mr. Moore:

Q. Did this man here mention to you anything about a man by the name of Wallace? A. Not to my knowledge.

Q. He didn't mention anybody by the name of Wallace to you at the time? A. That was quite sometime ago, but I can't recall him mentioning any name.

Q. You can't recall him mentioning anybody by the name of Wallace? A. No, sir.

Mr. Moore: I believe that is all we have right now.

Mr. Allen: I believe that is all.

The Court: Call your next witness.

Mr. Moore: We reserve the right to question him further.

Mr. Allen: Captain Gilbert.

133 DALTON L. GILBERT, after having been duly sworn, testified as follows:

Direct Examination By Mr. Allen:

Q. Give your name to the Court and jury, please. A. My name is Dalton L. Gilbert.

Q. Where do you live, Mr. Gilbert? A. I live at 201 Hurstview Drive, Hurst, Texas.

Q. How long have you lived there? A. At this address, about two years.

Q. What official position, if any, do you hold with the City of Hurst, Texas, at this time? A. I am captain with the police department.

Q. On October 21 of last year, or 22 of last year, what, if any, official position did you hold? A. At that time I was sergeant with the police department.

Q. On the date of October 22 last year, did you have occasion to receive any money and, if so, state from whom you received it. A. Yes, sir, I received some money from Detective Bobby Light.

Q. All right, sir. What did you do with that money? A. I took the money and placed it in my desk, in a drawer of my desk and locked it up.

Q. Did anybody else have a key to that? A. No, sir. I am the only one. There is one key and I have it.

Q. Now, after you locked it up, what did you do later, if anything? A. Well, the next day, on the 23rd of

134 of October, Sheriff Wayne McCollum and Mr. Cox—

Q. Willis Cox? A. Yes, sir, with the sheriff's office here, —came to my office in the afternoon and I took the money out of the desk, unlocked the desk, took the money out. We spread newspapers on top of my desk because there was some dirt and bits of grass in with it, spread newspapers on top of my desk and the three of us counted the money there on top of my desk.

Q. Then what did you do with it, Captain Gilbert? What did you do with the money? A. I turned it over to the sheriff.

Q. Do you know whether you all marked it or identified it or not? Do you recall or not? A. We broke the coins down as to denominations and placed them in separate bags, and in each bag we placed a slip of paper with the amount of money, what the denomination of the coins were, and we each one of us initialed the slip of paper before we sealed it inside the bag.

Mr. Allen: I believe that is all.

Cross Examination By Mr. Moore:

Q. Mr. Light has testified that he received several hundred dollars, or he didn't know exactly what it was in coins. Do you know exactly how much money was there? A. No, sir, I do not.

Q. You did not count it? A. I didn't total the
135 total amount. All we did was total the different denominations.

Q. And the different bags? A. Yes, sir.

Q. But you didn't take a total of all of it? A. No, sir, I didn't.

Q. Did the defendant have any other money on him? A. At that time the defendant was not there, sir.

Q. Well, did you take the defendant under arrest there? A. When—The first time I saw the defendant on the date of the 22nd, he was in custody. His property had already been taken from him and bagged up, so I do not know what the defendant had on him.

Q. Who would know this fact? A. Well, the jailer that checked him in.

Q. Is he here today? A. No, sir.

Q. Would Mr. Light know? A. Counselor, I wouldn't know whether he would or not.

Q. What I am getting at, this is a material fact in this case, whether or not he fraudulently took over $500.00 or not. Mr. Light here said already that it was around several hundred dollars he thought; he didn't know for sure. Now, the other testimony has been $600.00. Well, if that is true, then it is not $500.00. It is material, you see. That is why I want to know.

Mr. Allen: We object to that, Your Honor. It
136 is not material.

The Court: Sustain the objection to the statement by the attorney. It is not evidence.

Mr. Moore: I believe that is all.

Mr. Allen: That is all. Thank you, Captain. Sheriff Wayne McCollum.

WAYNE McCOLLUM, after having been duly sworn, testified as follows:

Direct Examination By Mr. Allen:

Q. You are Sheriff Wayne McCollum? A. That is correct.

Q. You live here in Waxahachie? A. That is right.

Q. And how long have you been sheriff? A. Four years and a few months.

Q. All right, sir. Sheriff, I noticed you have a bag. What is in that bag? A. Money.

Q. Where did you get that? A. From Sergeant Gilbert from the Hurst City Police Department.

Q. Tell the Court and jury where you were and the circumstances under which you received it. A. We went to the police department in Hurst, picked up the money, counted it with the sergeant there, and he turned it over to us and I have kept it in the vault ever since.

137 Q. You mean Sergeant Gilbert? A. That is right.

Q. Captain Gilbert? A. Captain Gilbert.

Q. I believe he was sergeant at that time. A. That is true.

Q. Sheriff, to start with I will ask you to look at that first one there. Now, I notice that is in a Manila bag and that is initialed by whom? A. The sergeant, myself and Mr. Cox, the deputy with me.

Q. All right. Now, were you all present when this money was counted in this bag here? A. That is true.

Q. And is that all three of your initials on that? A. That is true; we all initialed it at the same time.

Q. All right, sir.

Mr. Moore: Your Honor, I object to introducing this in evidence. I can't see that it has any bearing on it, as far as this [illegible] concerned.

The Court: Overrule the objection.

Q. Sheriff, what does that reflect—Did you all count that correctly there? A. Yes, sir; it was $11.10 in this particular bag.

Q. What denomination? A. Loose nickels.

Q. All right, sir.

138 (Manila envelope of nickels marked for identification as State's Exhibit 1.)

Q. Now, that, I believe, for the purpose of the record, are nickels. Right? In there? A. That is true.

Q. We submit that to you to look at. I ask you to look at this second Manila bag. A. Yes, sir. This is $4.80, mixed coins. It is signed by Sergeant Gilbert and myself and Willis Cox.

Q. All right, sir. Were you all all present when this was counted too? A. That is right.

Q. Without asking the same question, you were present when each of these bags— A. When each of these bags was counted we were present.

Mr. Moore: You did count this, of course? A. Yes.

Q. I will ask you to look at that. That is—A. That is the loose coins.

(Manila envelope of mixed coins marked for identification as State's Exhibit 2.)

Mr. Moore: I would like to renew my objection in this case. We are introducing evidence here which is not proven to be from the theft alleged. There is no real connection between this and the theft.

The Court: Overrule it for the present, Counselor.

139 Mr. Moore: We except. A. This is $6.70 in loose dimes.

Q. Loose dimes? A. Yes, sir; initialed by the same parties.

(Manila envelope of dimes marked for identification as State's Exhibit 3.)

A. Mixed rolls of coins, initialed by the same parties, $33.50. Just rolls of coins.

Q. Rolls of coins? A. Yes, sir.

(Manila envelope of mixed rolls of coins marked for identification as State's Exhibit 4.)

A. $26.16 in loose pennies.

(Manila envelope of pennies marked for identification as State's Exhibit 5.)

A. This is loose quarters, $1.00, signed by the same people.

(Manila envelope of quarters marked for identification as State's Exhibit 6.)

Q. Now, Sheriff, you have had this in your possession, I understand, until you brought it up here this morning. A. That is true, had it in the safe.

Q. Now, directing your attention to about October 25, Sheriff, I will ask you if you had occasion to go anywhere with this defendant, and if so, just tell the judge and the jury what the circumstances were. A. I did. I talked to Mr. Bush. He voluntarily wanted to take us to the
140 scene of where he had destroyed the box that this money came out of. Also, —

Mr. Moore: Your Honor, I would like to object here that counsel hasn't proven that the man was warned of his rights or anything before he was asked to testify or make any statements at all in this case.

The Court: He is presenting an exception. Overrule it.

Q. Go ahead, Sheriff. A. He voluntarily took us to the other side of Arlington about five miles out in a country gravel pit, abandoned gravel pit, where he had burned the car papers, the book where the coin collector keeps these coins in, —

The Court: I didn't understand you. A. The coin collector has a book, Judge, that they put them in. And all the papers that was in the box, he told us that he burned them at this particular spot.

Q. What did you find there, Sheriff? A. I found some coins and also the burnt—burnt coins and also the box.

Q. You say box. You mean metal cabinet? A. Metal cabinet, yes, sir.

Q. All right, sir. Now, the coins first. Did he take you to the exact spot? A. He did. I couldn't have found it

no other way. It was out in the country in the woods where an old abandoned gravel pit was. He told us how he
141 got the metal cabinet out of Mr. Hackler's place, took it out on the back porch, taken a screw driver and broke into it and left from there and went to the gravel pit, and that is where he abandoned the metal box. He even backed over the metal box to keep it from being so bulky and took it approximately twenty feet from where he burnt them and throwed it in a ravine where no one could find it without particularly having to know where it was.

Q. Did he tell you that? A. He took us to where it was and told us all about it.

Q. Did he tell you—

Mr. Moore: Your Honor, I can't see—This is hearsay and I don't think it is proper to testify what the man told him. If he wants to testify what he saw and observed, we go along with that.

The Court: Overrule the objection.

Mr. Moore: We except to it.

Q. Just tell the judge and jury what he told you. A. We set down there at the scene where this money was collected, we took a stick and raked around and Mr. Bush set there and told us how he got in the house, taken the metal cabinet out on the back porch, taken a screw driver, broke into the cabinet and left and went to the place where it was burned. He showed us every bit of it. We set there and he told us all about it, and a lot about other stuff that he had stolen from different places, Ft. Worth,—

Mr. Moore: Your Honor, we object again.

142 The Court: Sustain the objection.

Mr. Moore: This is nothing but prejudicing the minds of the jury.

The Court: Sustain the objection as to that last statement.

Q. Sheriff, I will show you what purports to be a battered-up, green metal cabinet and ask you to look at that. A. That is the cabinet that Mr. Bush took us to at the gravel pit where it was throwed over into the ravine.

Q. Is that the metal cabinet he told you he backed over? A. That is the metal cabinet he told us he got out of Mr. Hackler's house.

Mr. Moore: Your Honor, I don't believe that is responsive to whether he backed over it, to counsel's question.

The Court: What was your question?

Q. I asked him if this is the cabinet that the defendant told him he backed over at that spot. A. Yes, it is.

The Court: Overrule the objection.

(Green metal box marked for identification as State's Exhibit 7.)

Q. Have you had this in your possession until you brought it to my office? A. Yes, sir.

Q. Now, this doesn't have to be passed around. I will put it back out of the way. If any of you want to see
143 it, you feel free to ask for it and we will get it to you. Now, Sheriff, I notice you have some pennies and different assorted coins. Those are the ones that you say you got out there that he showed you where he had burned the papers and so forth? A. Yes, sir, even one of the little stamps that came off of the book, coin collector's book.

Q. I see. It is kind of a seal deal? A. It is a seal.

Q. Government seal? A. I don't know what it is.

(Manila envelope containing assortment of coins marked for identification as State's Exhibit 8.)

Mr. Allen: I believe that is all, Counselor.

Mr. Moore: I believe I am going to pass the witness at the present time.

The Court: All right, sir.

Mr. Allen: Mrs. L. C. Hackler. Come around and have that chair, Mrs. Hackler. You were sworn yesterday, were you not?

Mrs. Hackler: No.

Q. You were not sworn?

MABLE HACKLER, after having been duly sworn, testified as follows:

Direct Examination By Mr. Allen:

Q. Give your name to the judge and jury, please. A. I am Mabel Hackler, Mrs. L. C.

144 Q. Where do you live, Mrs. Hackler? A. I live at Ovilla, Red Oak, Texas, Route 1.

Q. Your house is in Ellis County? A. Yes, it is.

Q. With whom do you live? A. My husband, L. C. Hackler.

Q. What do you do, Mrs. Hackler? A. I am a pattern maker for Ike Clark Company in Dallas.

Q. Do you know this defendant, J. E. Bush? A. Yes, I do.

Q. All right. I will ask you, Mrs. Hackler, if anything unusual happened out at your house on or about October 21, last year? A. Yes.

Q. What if anything happened out there that was unusual? A. I missed a box, a container that had my coin collection in it, and I had my husband call the sheriff's office and report it.

Q. All right. Now, I will ask you, before you make any other statement, what kind of metal cabinet was that? A. Well, it was something like that.

Q. I will ask you to look at it and see if that resembles the one you had? A. Yes, it does.

Q. Of course, it is battered now. A. I couldn't say definitely that is it, but it is similar to it, looks like it. Same color.

145 Q. All right. Look like the same lid? A. Yes.

Q. Did it look like the same fastener? A. It had a latch like that.

Q. Now, is this a hobby with you and your husband, to collect coins? A. Yes, it is.

Q. I will start here with some coins that have been introduced in evidence, Mrs. Hackler, and ask you to look at them and see if you can identify any of those in there. Here are two more pennies. See if you can identify them. I don't know wehther you can or not. A. No, I couldn't say that they were mine, naturally. No, I wouldn't know.

Q. You wouldn't have any way of knowing? A. No, I wouldn't.

Q. What is this? A. This comes out of a mint set, of which I had several.

Q. Well, did you have any—Look at that coin there. Did you have a half dollar like that? A. Well, I had half dollars, 1959 mint sets, but I am not sure that is what that is.

Q. No, I don't mean you can identify that as being yours

because there is more than one of those, but did you have some of those? A. Yes, I had some in the mint set.

Q. Now, I will empty out some of these rolled
146 coins—that has been introduced in evidence—and ask you to look at some of those, just pick them up and look at them, just different ones, and see if you recognize any of those as being yours. A. I recognize the writing as being my writing.

Q. I will ask you, did you roll up coins of that make and put your initials or name on them? A. I did.

Q. Is that your writing on those? A. Yes, sir.

Q. Look at all of that writing on them and see if that is yours, the ones that do. A. Some of them is my daughter-in-law's writing. These are mine.

Q. The ones that your daughter-in-law put them on, were they your coins? A. Yes, they were. Most of that writing is mine.

Q. These are different denominations, are they not? A. Yes, sir.

Q. Did you roll them up? A. I did.

Q. I will empty these out and ask you to look at that stack and ask you if there is any there you can identify one way or the other. A. I can identify this because that is where I had divided them out and put numbers on them to take to a coin collecting agency to put on what they call a bid board to sell them, because I had put all these
147 little numbers in them telling what they were.

Q. Those little numbers you put in are in your writing? A. Yes, sir. I separated out my surplus and was going to sell these, put them on the bid board in Dallas.

Q. These were your surplus? A. Yes, sir, they are duplicates.

Q. I notice they are different denominations, quarters, pennies, dimes, maybe something else, but I can see quarters, dimes, nickels, pennies. A. That is right.

Q. These that have writing on them, which are many, are the ones you put on there yourself and numbered them? A. That is right.

Q. I don't know whether you would have any way of knowing about these quarters or not. Look at those. There are four quarters there and they have been introduced in evidence. A. This is a proof coin there, these are.

Q. That is a proof coin? A. Yes, sir.

Q. What do you mean, a proof coin? A. It is a coin not run through the regular stamping. They are done by hand stamping and you get a set of proof coins, a penny, nickel, dime, quarter and half dollar, ninety-one cents, and you pay $2.10 for them and they increase in value quite rapidly.

Q. Did you have any of these? A. They have a mirror-like finish.

148 Q. Did you have any like these? A. Yes, sir, I had several sets of proof coins. They are just put in those plastic containers and they come, all the coins in one little envelope. You have one of them over there.

Q. Now, just look at these—I will not pore them out—dimes which are introduced in evidence. I don't know whether you can identify them or say you had some like that or not. A. well, I had a lot of dimes, but I couldn't say those are mine because you can't tell money from money.

Q. Well, speaking of that, did you have dates—Do you know whether they had dates on them like that? A. I had all kinds of dates. There is another proof coin right there.

Q. Did you have proof coins of dimes? A. Sure. Every proof set has a dime in it, has one of every one except the silver dollar.

Q. Did you likewise have pennies? A. More pennies than anything else.

Q. I will ask you to feel that and see if that is heavier than anything else you had? A. There is another proof coin in there, looks like it, looks shiny like that.

Q. In other words, did you have a proof penny? A. I sure did.

Q. Did I ask you if you knew the defendant? A. Yes, you did.

149 Q. And he was living with you and your husband, L. C. Hackler, on this date? A. Yes, sir.

Mr. Allen: I believe that is all.

Cross Examination by Mr. Moore

Q. Mrs. Hackler, I just have a few questions. Of course, you said you knew the defendant here now. While he was in your home, did he conduct himself fairly well? A. As a gentleman at all times, yes.

Q. He didn't—He is not a vagrant or something like that? A. No.

Q. While he was there, did he work? A. Worked like a Trojan.

Q. Let me ask you this question, you have been close to this man for a pretty good while. Do you think that he is of unsound mind? A. Well, I didn't think so or I wouldn't have had a person of that type in my home.

Q. Do you now? A. No.

Q. Do you think he has any mental defect? A. I don't think that I am capable of saying.

Mr. Allen: We object to that. We don't think that is the criterion.

The Court: Sustain it.

Mr. Moore: I believe that is all we have at the
150 present time.

Mr. Allen: That is all, Mrs. Hackler.

(Photostatic copies of indictment, judgment, sentence, and records of Texas Department of Corrections marked, respectively, as State's Exhibits 9 through 12, which original Exhibits accompany this Statement of Facts.)

Mr. Moore: Mr. Allen, if you don't mind, I'd like to have a minute. I haven't seen these before and there is quite a bit here.

The Court: Take the jury in the jury room for a brief recess.

(Jury was retired and court was in recess. Jury was returned and the following proceedings were had:)

L. C. HACKLER, recalled to the stand, testified as follows:

Redirect Examination by Mr. Allen

Q. You are the same L. C. Hackler that testified in this case a little while ago? A. (Witness nods.)

Q. I will ask you this—Were you sworn yesterday? A. Uh huh.

Q. All righ. I direct your attention to a metal cabinet that has been introduced in evidence. Do you
151 recognize that cabinet? A. Sure do.

Q. Whose cabinet is that? A. Mine.

Q. I will ask you, Mr. Hackler, if you can identify any of these coins here; look at those and see if you can identify any of them. A. I can identify this writing on here.

Q. All right. Whose writing is that? A. My wife's.

Q. Were you present when she rolled those and put the writing on them? A. (Witness nods head.)

Q. Are those your coins? A. I say they are.

Q. You can look at these. I will ask you to look at those and see if you have any coins like those. I doubt if you can identify them. A. Well, now the only thing I could say about these, I had coins just like them, but there are so many millions of them made, it would be hard to identify a certain coin.

Q. I take it that those that are marked by your wife you could identify? A. I can identify all of that writing.

Q. Can you identify any of these? A. Oh, yeah, we had those type.

152 Q. Were you present when that was done? A. We ordered these from the mint; they were delivered by mail to us.

Q. How long have you been in this coin collecting business? A. Oh, approximately thirty years.

Q. How long has your wife been in it? A. About five or six or seven.

Q. Did you have any of these coins before you married her? A. No.

Q. None of these coins. Are these your coins? A. They are.

Q. Did you consent to this defendant here, did you give your consent to him to take those coins? A. No.

Q. Did you consent for anybody to take them out of your house on that day? A. Nobody.

Q. I believe that is all.

Mr. Moore: We pass the witness at the present time and reserve cross examination for a later time of trial.

The Court: All right. Stand aside. Call your next witness.

Mr. Allen: Your Honor, at this time we want to offer into evidence these instruments here.

The Court: Proceed; proceed.

Mr. Moore: Your Honor, we would like to object to

these instruments here on the ground that they
153 haven't been properly proved up, no testimony whatsoever that that is the same man as this defendant over here. They are not properly identified, and we would like to have your ruling on that.

The Court: Overrule your objection.

Mr. Moore: We except to that.

The Court: Let's see, are they certified?

Mr. Allen: Yes, sir, they are certified.

Mr. Moore: There is nothing here to show that is the same man as this defendant.

The Court: Well,—. Well, I am silent. Proceed.

Mr. Allen: We introduce first the indictment, a certified copy of the indictment which was filed in Eastland County, Texas. I will read it.

(State's Exhibit 9 read to the jury by Mr. Allen.)

Mr. Allen: That is signed by somebody, the foreman of the grand jury. I don't know. I can't make that out. I don't know what the name is, but it is signed by the foreman of the grand jury. Now, I read also, in connection with that case, the judgment of conviction on plea of guilty.

(State's Exhibit 10 read to the jury by Mr. Allen.)

Mr. Allen: I will read also the sentence.

(State's Exhibit 11 read to the jury by Mr. Allen.)

Mr. Allen: We offer that into evidence. I think Counsel has already seen that too.

Mr. Moore: Counsel would like to object very strenu-
ously to this, and especially the photographs. There
154 are a number of different pages and we don't believe each page is certified. There is no relation to this defendant here with those proceedings there. In other words, the pictures there could possibly have no connection with that proceeding.

The Court: What are you offering, Counselor? Every bit?

Mr. Allen: Yes, sir.

The Court: Where is the indictment in the case?

Mr. Allen: Judge, that is the commitment.

Mr. Moore: Your Honor, we would like for our objection to state that we realize there are a number of pages there and it has been certified to by the clerk, but we don't know how many pages are to be there and we don't know that this picture was properly taken or the relation that it has to this particular case. We think the admission of it prior to identification would be prejudicial error.

The Court: I didn't hear that last statement, Counselor.

Mr. Moore: We feel like the introduction of this instrument here without certification on each page from the clerk out there or without identification would be improper and that it would get to the jury prior to the time it would be identified. We consider it illegal evidence at this time.

The Court: Overrule the objection.

Mr. Moore: We except.

Mr. Allen: We offer in evidence certified copy here of the records of Huntsville. I will read them to you.

155 (State's Exhibit 12 read to the jury by Mr. Allen.)

Mr. Allen: Here we have the certification to it and fingerprints and photographs for you to look at.

Mr. Moore: Your Honor.

The Court: Yes, sir.

Mr. Moore: We would like to renew our objection to this thing here. It has some statements about the man's sanity and other statements contained in this record. It doesn't say where he was ever tried on this issue of sanity; it tends to be inflammatory and be conclusive evidence against a number of facts which are not in issue at this time, and which he hasn't properly proved up, and again we don't know how many pages were contained in this original certification and whether all of them there or just a part of them, not having seen this before and not having the benefit of cross examination of the county clerk or the district clerk.

The Court: Overrule the objection.

Mr. Moore: We except to that.

The Court: It is about twelve; we will recess until one. You must remain together, members of the jury, throughout the trial as a unit at all times, except for such brief purposes as may be necessary. We will have a lady bailiff and we will also have a man bailiff and they will take you

out to lunch, all of you, and bring you back and we will resume the trial.

(Court was in recess until 1:13, at which time the
156 jury was returned and the following proceedings were had:)

The Court: Proceed, gentlemen.

EARL CONNOR, JR., after having been duly sworn, testified as follows:

Direct Examination by Mr. Allen

Q. State your name, please, sir. A. Earl Connor, Jr.

Q. Where do you live Mr. Connor? A. Eastland, Texas.

Q. How long have you lived out there? A. Better than fifty years.

Q. Mr. Connor, do you hold any official position out there at this time? A. I am district and county attorney there.

Q. How long have you been in that capacity? A. Well, from 1937 until 1947 and from January 1, 1958 to the present time. I am now holding that position.

Q. Then you were criminal district attorney out there in 1941, all of 1941? A. I was.

Q. Were you also in 1940? A. Yes, sir.

Q. All right. I will ask you if you prosecuted a case styled State of Texas vs. J. E. Bush in 1941. A. Yes, sir, I did.

Q. I will ask you if you recognize this defendant
157 sitting here at the counsel table? A. I do.

Q. Is that the same J. E. Bush that you prosecuted out there in Cause No. 10330 in the Eastland District Court No. 88? A. He is.

Q. What was that for? Do you recall? A. Cattle theft.

Q. Was that—Do you recall the date of the indictment in that case? A. The date of the indictment itself?

Q. Yes, sir. A. I didn't check it. I do not recall. It was subsequent to October 4, I believe, September term. That was in the September term, when the indictment was returned, alleging the offense to be October 4, 1941.

Q. All right, sir. Now, do you recall the date of the conviction? A. As I recall, it was November 12, I believe, 1941.

Q. Now, Mr. Connor, did that conviction become final or was he sentenced in that case? A. Yes, sir, he was; it became final.

Q. Did he go to the penitentiary on that case? A. Yes, sir, on that case.

Q. Does this defendant have any kin people out in your county? A. He has a brother-in-law, alleged in that indictmen, named in that indictment, W. C. Kimbrough,
158 and his sister. He married his sister.

Q. Is she still living? A. Yes, sir.

Q. She lives out there? A. Yes, sir.

Mr. Allen: I believe that is all.

Cross Examination by Mr. Moore

Q. Mr. Connor, you say you are from Eastland, Texas? A. Yes, sir.

Q. How far is it from here? A. Mr. Moore, I believe it is around a hundred and—I'd say around a hundred and thirty miles, I believe. Going direct west of Fort Worth, it is between ninety and a hundred miles on highway 80.

Q. I believe you stated awhile ago and I didn't get it, when did you go in office the first time? A. 1937, January 1, '37, and continued until December 31, '46.

Q. '46. You have identified this defendant here, and I'd like to call your attention—Is this the papers?

Mr. Allen: Uh huh.

Q. I'd like to especially call your attention to these papers. I notice in here that you said the indictment was in October and the sentence was in November, is that correct? A. I believe I said, Mr. Moore, that the indictment was returned during the September term, 1941.

159 Q. He was sentenced in November? A. Yes.

Q. He did have an attorney to represent him? A. That I don't recall.

Q. I will ask you this question here as soon as the jury finish with this. These papers here, one styled "sentence." I notice another styled "sentence" here; would you please explain what the difference is between the two? I believe this one here is dated the third day of November and this one here is dated the 12th day of November, which purports to be the same sentence. Would you please explain what the difference is here? A. This 3rd day of November, Mr.

Moore, I believe that that refers to the beginning of the November term. "There was begun and holden a regular term of the District Court of Eastland County, Texas, at the Courthouse of said County in the City of Eastland, present and presiding, Honorable B. W. Patterson, District Judge of the 88th Judicial District." Which term, I would gather from this, opened November 3, and this sentence was pronounced upon Mr. Bush in cause No. 10330 on a day of that term which is November 12 of that term.

Q. Where is November 12 on here? A. That is the date of the sentence. This is just the preamble, so to speak.

Q. Would you explain what the difference is in these two judgments here? A. Which judgment do you mean?

160 Q. I mean sentence. A. What other sentence do you mean?

Q. This one right here. This has been admitted into evidence here, this sentence, both of them. A. This is a sentence of the Court here, dated November 12, 1941, Cause No. 10330.

Q. That was signed by the judge? A. This is signed by the judge.

Q. This one here, is this one signed by the judge? A. No; I think that is the form they have in the books, then the judge, I think, signs them at the end of the term, but this was signed at that time. I don't know. Probably it has the same thing in it.

Q. Is this a proper sentence here? We want the official records here. I don't know. I am asking that. A. I wouldn't pass on that. I'd say that these all constitute the records in that particular case. He was convicted in that 88th Court and that is Judge Patterson's signature.

Q. I notice that in this judgment here the issue of sanity came up, Mr. Connor. Did you have an actual trial on the sanity of this defendant? A. In Cause No. 10330?

Q. Yes, sir. A. That I can't say off hand, Mr. Moore. I sure can't.

Q. At this time did you know he had a previous judgment of insanity? Were you aware of this fact?

161 A. No, sir, I don't think so.

Q. What evidence—Do you recall any evidence that was put on with regards to his sanity at this time? A. No, I don't.

Mr. Moore: I believe that is all that we have of the witness at the present time.

Mr. Allen: Counsel, will you excuse Mr. Connor and let him go to Eastland?

Mr. Moore: I see no reason why not.

The Court: You are excused, Mr. Connor.

(Records of the Texas Department of Corrections marked for identification as State's Exhibit 13; indictment, judgment and sentence marked for identification as State's Exhibit 14.)

Mr. Moore: Counsel, I hate to delay this thing, but would you mind explaining to me what this is? Maybe that would help. I wouldn't have time to read this between now and this time tomorrow.

(Conference by attorneys at table.)

Mr. Moore: Your Honor, I am not so sure about this; I haven't had time to read it, but I think this, I would have this objection to this part of it, the fact that the sentence is not signed by the judge. If they want to introduce it in evidence, I don't believe it is valid unless it has the judge's signature on it.

The Court: Overrule the objection.

Mr. Moore: Note our exception.

162 **Offer in Evidence**

Mr. Parramore: We offer in evidence State's Exhibit No. 14 and State's Exhibit No. 13, in accordance with the Judge's ruling.

Mr. Moore: Is it offered in evidence in its entirety?

Mr. Parramore: No, I am offering it, as I said before, I am offering State's Exhibit 14 in evidence from the formal part of the pleading down through the first phrase "against the peace and dignity of the State," the first time that that phrase, "against the peace and dignity of the State," is encountered.

Mr. Moore: This is just part of an indictment.

Mr. Parramore: I will be happy to read the whole thing.

Mr. Moore: I am sure he would be happy to read the whole thing.

The Court: Well, if he objects on that basis—Do you want all of it read, Counselor?

Mr. Moore: Well, I would like for the State to put on some sort of proof, identify this thing and show what this judgment is, whether it only applies to a part of it or what. I don't know whether the sentence and judgment apply to all of it or part of it or what, Your Honor. This is the first time I have seen this thing. I haven't had time to look at it. I don't know anything about it.

The Court: You see it now. What is your objection?

Mr. Parramore: State's Exhibit 13 and State's Exhibit 14 we offer as certified copies of what they purport to be certified copies of any they are plain on their face.

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Mr. Moore: We again have our objection to all of this that hasn't been properly identified or any part of it properly identified or the State hasn't proven whether or not the judgment or sentence offered in evidence here is for part of what is alleged in the indictment or all of it.

The Court: Well, I take it you are objecting to all of it and then objecting to portions of it, is that correct?

Mr. Moore: That is correct, sir. We are objecting specificially on the sentence because it is not signed by the judge, at least I didn't see where it was, and we would further say that if it is to be admitted into evidence, it should be admitted in full, if the Court overrules our objection.

The Court: All right, I overrule your objection; it may all of it be admitted, as I understand what you say.

The Moore: Note our exception.

The Court: That is, you want all of it to go in if it is admitted.

Mr. Moore: We object to any of it being admitted into evidence, first of all.

The Court: I overrule that objection.

Mr. Moore: Then we say if is is going to be admitted in evidence, then everything should be admitted in evidence.

The Court: All right, sir. Do you offer all of it?

Mr. Parramore: Yes, sir.

The Court: Proceed.

164 Mr. Parramore: Gentlemen of the jury, I will read from State's Exhibit 14 as follows:

(State's Exhibit 14 read to the jury by Mr. Parramore.)

Mr. Parramore: I am going to read from State's Exhibit 13, which begins:

(State's Exhibit 13 read to the jury by Mr. Parramore.)

Mr. Parramore: The State calls W. H. Bryant. Have you been sworn, Mr. Bryant?

W. H. BRYANT, after having been duly sworn, testified as follows:

Direct Examination by Mr. Parramore

Q. Mr. Bryant, you are with the Fort Worth police department, is that correct? A. Yes, sir.

Q. How long have you been so employed? A. Twenty-six years.

Q. Mr. Bryant, I will show you State's Exhibit No. 14, which has been introduced in evidence, and ask you if you are familiar with the case set out in that indictment, namely, the case against James Edward Bush for the theft of thirty some odd cans of cream of over the value of three hundred some odd dollars? A. Yes, sir.

165 Q. Did you investigate this case? A. Yes, sir, I sure did.

Q. Were you employed as a police officer in December, 1945? A. Yes, sir.

Q. Did you arrest the defendant? A. Yes, sir, I sure did.

Q. In December, 1945? James Edward Bush that is shown in State's Exhibit 14, the papers that you now hold in your hand, is the James Edward Bush mentioned therein the same James Edward Bush who is the defendant in this cause here? A. Yes, sir.

Q. Sitting at counsel table? A. Yes, sir, he sure is.

Q. And he was duly and legally convicted in Tarrant County? A. Yes, sir.

Mr. Parramore: Thank you, Mr. Bryant.

Cross Examination by Mr. Moore

Q. Mr. Bryant, did you say you were on the police force there in Fort Worth? A. Yes, sir.

Q. You were at the time this was turned loose. I notice in here a lot of forms. Now, you are not prepared to testify, are you, whether or not this is a true and correct copy of the judgment, indictment or anything up there in Fort Worth, are you? A. According to the number, it is, sir.

166 Q. According to the papers? A. I don't think I have ever seen that paper before.

Q. You have never seen this paper before. Then your testimony is not to this. You just say you know the defendant, have seen him before, is that correct? A. Yes, sir, I know the defendant.

Q. Now, Mr. Bryant, I will ask you this question here: there are some statements in here of the sanity of this defendant. I will ask you about the statement in here about he had an attorney to represent him. Is it the customary thing in this situation—

Mr. Allen: Your Honor, he is going into a matter that is irrelevant, immaterial and has no bearing—

The Court: Sustain the objection.

Q. Then, Mr. Bryant, you couldn't say, or are you saying that this person here is the same person named in these papers here? A. Yes, sir, he is, James Edgar Bush.

Mr. Moore: That is all we have right now, but I would like to reserve the right to cross examine this man further, Your Honor.

The Court: Well, on what line, Counselor?

Mr. Moore: Well, Your Honor, we have got some papers in evidence here; I have never seen them before; there is no testimony on the identification of them, we have nothing here, and I—

167 The Court: All right. Call you next witness. Are you through with him?

Mr. Allen: The State is through with him, yes, sir.

The Court: Call your next witness.

Mr. Allen: Doc Yandell.

R. I. YANDELL, after being duly sworn, testified as follows:

Direct Examination by Mr. Allen

Q. Have a seat, sir. State your name, please. A. Yandell, R. I. Yandell.

Q. Better known as Doc? A. That is right.

Q. Where do you live, Mr. Yandell? A. 402 Jackson.

Q. Here in Waxahachie? A. Yes, sir.

Q. You hold any official position at this time with the County of Ellis? A. Jailer.

Q. How long have you held that position? A. I have been there four years, a little better.

(Fingerprint card marked for identification as State's Exhibit 15, the original of which exhibit accompanies this statement of facts.)

Q. Do you know the defendant, James Edward Bush? A. Yes, sir.

168 Q. Sitting there at counsel table? Now, I show you an instrument that has been identified by the court reporter, marked Exhibit, State's Exhibit No. 15. Now, I will ask you if you have seen that before. A. Yes, sir, I made them.

Q. What is that, Mr. Yandell? A. That is a fingerprint card of Mr. Bush.

Q. Do you make fingerprints of all prisoners in and out of the jail? A. Yes, sir.

Q. And you did make these prints of the defendant, James Edward Bush? A. Yes, sir.

Offer in Evidence

Mr. Allen: Your Honor, we offer these in evidence.

The Court: Proceed.

Mr. Allen: I believe that is all at this time.

Mr. Moore: That is all I have at this time.

Mr. Allen: Just a minute, Doc. Let me check just a minute. I think that is all I have got on you. Willis Cox.

WILLIS COX, after being duly sworn, testified as follows:

Direct Examination by Mr. Allen

Q Have a seat, Mr. Cox. Give your name to the Court and jury, please, sir. A. Willis Cox.

169 Q. Where do you live, Mr. Cox? A. Waxahachie.

Q. What official position, if any, do you hold at this time? A. Deputy sheriff.

Q. How long have you been so employed? A. Most of the time since 1937.

Q. All right, sir. Mr. Cox, without going into it, I want you to look at this, without going into great detail. I am going to show you a bunch of exhibits that have been introduced here and are in evidence, and I want you to look at them, manila bags containing numerous coins and with numerous identifications on them inside the bags. Now, Mr. Cox, I notice that one of these—Well, first I will ask you if you, do you know where these came from? A. Yes, sir.

Q. All right. Where did they come from? A. Sheriff Wayne McCollum and I picked it up at Hurst, Texas.

Q. Who was present at the time? A. Police, members of the Hurst Police Department.

Q. Would one of them be Sergeant Gilbert? A. Yes, sir.

Q. Now, this next question. I notice different amounts here. Were you present when this money was counted? A. Yes, sir.

Q. One shows $33.50; one shows $4.80; one shows $11.10; one shows $6.70; and here is one here, a dollar. Did
170 you all count that, as you recall, and initialed by you along with the other fellows? A. Yes, sir.

Q. Was that counted correctly? A. To the best of our ability, yes, sir.

Q. That total, I notice is above fifty dollars here. A. Yes, sir.

Q. I show you something here, Chief Cox, and see if you recognize that. You might have to look inside. A. Yes, sir.

Q. All right. Now, do you know where these came from? A. Yes, sir.

Q. Just tell the Court and jury where that list of coins came from. A. From an isolated spot about five miles north of Arlington in Tarrant County at—I don't know what the place had been used for, possibly gravel pit, and there had been a building of some sort there; there was a concrete foundation of something which indicated there had at some previous time been a building there—but it was rather an isolated spot, not on a public road at all, just a narrow lane down to it.

Q. Did you go there and get those coins? A. Yes, sir.

Q. Who went with you? A. Wayne McCollum, the sheriff, and James E. Bush.

Q. That is the defendant sitting here at counsel
171 table? A. Yes, sir.

Q. Did he show you where this was, where you went? A. Yes, sir.

Q. Did you know where it was before he showed it to you? A. No, we did not.

Q. What else did you find, if anything, out there? A. We found a metal cabinet approximately three feet tall, some twenty inches wide, that had been mashed and torn up, which Mr. Bush told us he had left there.

Q. I show you this, Mr. Cox, and ask you if that is the cabinet that you and Mr. McCollum went out there with the defendant—A. Yes, it is.

Q. Did he tell you that he took that out there or not? A. Yes, he said he left it there, that he took it there.

Q. Did he tell you where he got it? A. He told us he took it from the residence of L. C. Hackler at Ovilla.

Q. Did he tell you what was in the metal cabinet? A. Yes; a sum of money in coins, automobile papers and coin books and folders and possibly other papers.

Q. Did you find that metal cabinet by reason of his telling you and showing you? A. Yes, he told us and showed us where it was.

Q. Could you have found it without someone showing you? A. No, I don't think anyone could have.

Q. Did he say anything about burning anything,
172 or destroying anything? A. Yes, he said he took the money, papers and other things from this cabinet and numerous of these coins were placed in books that are used by coin collectors, or folders, that he took the coins from these folders and burned them there along with some automoble papers and possibly other papers.

Q. I see. Did he tell you that he stole this money—

Mr. Moore: I object to that.

The Court: Overrule the objection.

Q. At that time, I mean, did he tell you? A. Yes, he did.

Mr. Allen: I believe that is all.

Cross Examination by Mr. Moore

Q. Did he mention at this time an individual by the name of Wallace? A. I do not recall his having mentioned anyone by that name.

Q. He didn't say anything about a man by the name of Wallace? A. I do not recall him having mentioned it and I don't believe he did. I don't believe he has mentioned the name to me at any time.

Q. Mr. Cox, did he have any other money on his person when you picked him up at Hurst? A. Well, he was not at Hurst when we picked this money up.

Q. Well, did he have any other money on his person when you picked him up? A. Yes, a small amount. As I recall, possibly ten or twelve dollars.

173 Mr. Moore: I believe that is all.

Mr. Allen: I believe that is all.

The Court: Call your next witness.

Mr. Allen: Let me see Willis Cox again, a very important point.

Redirect Examination by Mr. Allen

Q. Mr. Cox, you stated that you had been in the employ of the County ever since 1937, or almost since that date. A. Yes, sir.

Q. Now, were you jailer at one time? A. Yes, sir.

Q. Then you moved up the ranks? A. Well, yes, sir.

Q. Now, let me ask you, Mr. Cox, during that period there, since 1937, have you made a study of fingerprints? A. Yes, sir, beginning in 1937.

Q. All right. Just tell the judge and the jury what study you have made in that respect. A. There is an institute known as the Institute of Applied Science in Chicago, recognized as one of the foremost schools there is that teaches identification and particularly fingerprints. I studied this course and I have studied the text and other material used by the Federal Bureau of Investigation; I have studied that material used by the Texas Department of Public Safety; I have attended numerous of their schools and seminars, and other matter and material from

174 other men wherever I could find it.

Q. In other words, you continued this study since 1937 and still study today at times? A. Yes, sir.

Q. Now, in that connection, have you had an opportunity to study fingerprints and catch criminals as a result? A. I have identified numerous men through their fingerprints, yes, sir.

Q. That is a part of your business as a deputy sheriff now? A. Yes, sir.

Q. All right. Now, Mr. Cox, I show you State's Exhibit No. 15, which has been admitted in evidence and which it is admitted that these are the fingerprints of this defendant, James Edward Bush. I want you to look at those and also I show you State's Exhibit No. 12, in which is included the fingerprints of the defendant in Cause No. 10330 in a case in which this defendant was sent to Huntsville from Eastland County, and ask you to look at those. First I will ask you if you have seen both of those before. A. Yes, I have.

Q. All right, sir. Now, look at those and compare them. A. I have compared them already.

Q. All right. Mr. Cox, I want you to tell the judge and the jury if, in your opinion, whether or not those are the same, the prints are of the same person? A. They are identical.

175 Mr. Allen: All right, sir. I believe that is all.

Mr. Moore: That is all. Well, now, this further question then. I will ask you then to look at this State's Exhibit No. 13, in which is included the fingerprints of the defendant in Cause No. 46490, in which he was convicted from Tarrant County, and compare the fingerprints there in that exhibit with those of this defendant in this case. A. I have compared it with the prints on this card.

Q. All right, sir. State whether or not, Mr. Cox, after you compared those, whether or not they are of the same person. A. They are.

Q. All right, sir. I believe that is all.

Mr. Moore: That is all we have.

Mr. Allen: The State rests, Your Honor.

The Court: What says the defendant?

Mr. Moore: Your Honor, we would like to call to the stand as our first witness Mr. Chestnut.

HARRY F. CHESTNUT, after having been duly sworn, testified as follows:

Direct Examination by Mr. Moore

Q. Would you please state your name to the Court? A. Harry F. Chestnut.

Q. What do you do? A. County Clerk of Navarro County.

Q. Mr. Chestnut, are you now at the present time
176 county clerk of Navarro County? A. Yes.

Q. I show you here a certified copy of a judgment certified copy of the proceedings in Cause No. 3387, held in the lunacy court of Navarro County, Texas. Is this an original copy? I mean, is this a certified copy of the original? A. It is a certified copy, yes, sir.

Q. Have you made a recent search to see whether or not this particular judgment has ever been vacated? A. Yes, I have.

Q. How recent was that? A. Well,—

Mr. Allen: Counsel, would you stand over just a little piece? A. One day last week. I don't remember what date it was. Maybe Monday. I believe it was Monday, yesterday morning.

Q. This is a certified copy of the proceedings? A. It is.

Offer in Evidence

Mr. Moore: We would like to offer this in evidence. We would like to offer it again.

(Judgment marked for identification as Defendant's Exhibit 1, which original exhibit accompanies this statement of facts.)

Mr. Moore: I would like, if I could, to read this to the jury.

(Defendant's Exhibit 1 read to the jury by Mr. Moore.)

177 Q. I now ask you if this is the same proceeding that occurred in your court and you do have custody of the records according to lunacy? I believe that is all I have.

The Court: Let me see it just a minute, Counselor.

Mr. Moore: I believe that is all I have with Mr. Chestnut, unless Mr. Allen has something.

Cross Examination by Mr. Allen

Q. I will ask this one question: Do you know this defendant? A. No. I have seen him in Corsicana.

Q. But you don't know him at all? A. No, sir.

Mr. Moore: We'd like to call to the witness stand next Mr. Doc Yandell.

R. I. YANDELL, recalled, testified as follows:

Cross Examination by Mr. Moore

Q. You are Doc Yandell and you are the present jailer at the County jail? A. Yes, sir.

Q. Of course, you said before you know this defendant here, James E. Bush. Doc, I ask you this question: You have been in close contact with him throughout the last few months and you have had an opportunity to observe his conduct and his actions? A. Yes, sir.

Q. Doc, has this man had severe headaches re-
178 cently? A. Yes, I have given him some Bayer Asprins; he called for them.

Q. Quite a few of them? A. I wouldn't say a big lot. I believe at two different times I got him Bayers. No, that was Bufferins; he couldn't take asprin.

Q. Has he been ill at any other time there? A. I don't believe so.

Q. Doc, have you noticed this person here as showing a possible lack of concern for his personal appearance?

Mr. Allen: Your Honor, we object to that. In the first place, Doc is under the rule and hasn't been in the courthouse. It is a leading question and we object to it.

The Court: I will overrule the objection. Don't lead the witness, Counselor.

Q. Doc, in your observation of the defendant's conduct, have you noticed anything in particular with regards to his appearance? A. Yes, he went down there for several days without shaving.

Q. Does he seem to particularly care one way or anothe about how he looks? A. No, he don't seem to.

Q. Was this care only after I came into the case or did he have it ever since he has been down there? A. No, when he first come in, why, he shaved pretty regular.

Q. When I came into the case, do you recall
179 whether or not he needed a shave? A. Yes, he did.

Q. He did. How long had he needed a shave? Do you remember? A. I wouldn't know just exactly. I'd say a month anyway.

Q. Did Sheriff Wayne McCollum take him to get a shave? A. Yes, sir.

Q. When was that? A. I believe that was last Friday.

Mr. Moore: I believe that is all we have right now.

Redirect Examinaiton by Mr. Allen:

Q. Mr. Yandell, how long have you know this defendant? How long have you known that defendant? A. Since 10/22/60.

Q. All right, sir. Have you had occasion to observe him down there at all times? A. Usually just at feeding time I'd see him.

Q. Have you seen him numerous times, observed him? A. Yes, sir, I have.

Q. Do you think he knows right from wrong today? A. I think so.

Q. Do you think he knew right from wrong on October 21, last year? A. Yes, sir.

Q. There is nothing strange about a man taking asprin, is there? A. No. He couldn't take asprin though; he had to take a Bufferin.

Q. I took Bufferin yesterday. Is there anything wrong in that?

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180 NOTE OF TYPIST:

The Statement of Facts does not contain a page 59.

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181 A. Well, I believe I did too.

Q. A man growing a beard, Peter Ustinov won an Oscar with a beard, didn't he?

Mr. Moore: Your Honor, I object to that.

The Court: Sustain it.

Mr. Allen: I withdraw the question. I believe that is all.

Mr. Moore: We would like to call Mr. Hackler to the stand.

L. C. HACKLER, recalled, testified as follows:

Cross Examination by Mr. Moore:

Q. Mr. Hackler, you have already announced you are from Ovilla and you live here in the county. Now, Mr. Hackler, I believe you also stated earlier that you know the defendant in this case and have known him for a period of approximately three years, is that correct? A. (Witness nods head.)

Q. Did you also state that he lived in your home with you and had a free run of the premises? A. That is right.

Q. Mr. Hackler, I call you attention specifically to Saturday morning about 10:30 a.m. Do you remember a conversation with me regarding this defendant? A. I do.

182 Q. Where were we at that time? A. Mrs. Lawson's Cafe in Ovilla.

Q. Were we in the presence of other people? Mrs. Lawson, for instance? A. Mrs. Lawson was there.

Q. Do you remember the result of our conversation? Do you remember what you said with regards to this man's condition of sanity or insanity? A. Probably. Part of it, anyway.

Q. Well, do you recall having said that this man was of unsound mind? A. I think I said he was crazy, but I didn't mean he didn't know right from wrong.

Q. But you said he was crazy. Did I ask you to sign an affidavit to that effect? A. Yes, you did.

Q. What did you tell me then? A. That I wouldn't sign it.

Q. Did you tell me that you wouldn't sign it or that you would feel better about talking to Judge Stout or Mr. Allen? A. I told you I wouldn't sign it unless they advised me to.

Q. Or you would talk to them first? A. I would talk to them first and if they advised me to sign it, I would sign it.

Q. You felt the man was insane. Did you read the affidavit? A. I read it. I didn't feel like he was legally

183 insane. I figure he knows right from wrong.

Q. Well, I am talking about at Ovilla. Do you remember there when you talked to me, did you say at that time he was of unsound mind? A. I think I made the remark that he was crazy.

Q. All right. Now, we came into the court here, did we not, and after a few minutes here you decided not to sign the affidavit, is that correct? A. That is right.

Q. Now, I want to call your attention, Mr. Hackler, to this defendant in another respect. You have stated here that you think that approximately $600.00 was taken away from your home. You don't know the real value, do you? Could it be $450.00? A. No, it is more than that.

Q. It is more than that, but you don't know how much it is for sure? A. I didn't know exactly. We had taken an inventory a short while before.

Q. But you are positive it was over $500.00? A. Oh, yeah.

Q. Now, I want to ask you now another thing, Mr. Hackler. Did this man here have any personal possessions, such as an automobile, car or anything else? A. He had a pick-up truck.

184 Q. What kind of truck was that? A. '49 or '50 Dodge.

Q. Where is that truck at the present time? A. I don't know.

Q. Do you know what happened to that truck after he was put into jail? A. Oh, yeah. He gave it to me.

Q. He gave it to you? Would you estimate the value of that truck? A. Oh, I doubt if it was worth more than I had to pay to save it. It was in hock at the bank and I had to pay it out.

Q. What was that at the bank? A. It cost me thirty-three dollars and some odd cents.

Q. Thirty-three dollars and something cents. Now, did this truck have good tires on it? A. Good rubber. And it run.

Q. Where is this truck now? A. I don't know. I sold it and I don't have any idea.

Q. You don't have any idea? How much did you get for the truck? A. Sixty-five dollars.

Q. Now, I will ask you this: Of course, the defendant had a certificate of title to this automobile, did he not? A. (Witness nods head.)

Q. Where was he at the time he signed this certificate of title? A. In the jail.

Q. Who took the acknowledgment? A. Justice McWhorter.

185 Q. A man? A. No, the lady, his daughter.

Q. But he signed over the title of this truck to you while he was in jail? A. The bank was going to come and get it and I asked him to let me have it and I would pay it out and he did.

Q. For thirty-one dollars? A. Thirty-one dollars, and it cost me two dollars and something else for transfer and so forth and so on.

Q. You got the truck, is that right? A. That is right.

Q. This affidavit I asked you to sign regarding the man's insanity—let's go back to that again—did you read it? A. I read it but I don't remember now what it said.

Q. But you drove to town in your own car to find out about signing it, is that right? A. Right.

Mr. Moore: I believe that is all we have.

Redirect Examination by Mr. Allen:

Q. Mr. Hackler, he mentioned something about Judge Stout and Bruce Allen and you wanting to come in. Isn't it a fact that he told you that the judge helped him to prepare it and you came in to check on it? A. That is the way I understood it.

Q. And did you find out Judge Stout didn't help him to prepare it? A. That is right.

186 Mr. Moore: Your Honor, I would like to clear this up. I don't recall having said anything in that regard, but didn't I say this affidavit would be necessary for a preliminary hearing and that was the purpose of it? A. You may have, but I understood you to say that Judge Stout helped you or had you draw it up or something like that. I could be mistaken; I can't remember; we talked so long.

Mr. Moore: I believe that is all.

Q. I will ask you this: You think this man knows right from wrong? A. Oh, yeah.

Q. You think he knew it that day out there? A. Yes, I do.

Q. Would you have had him in your home staying four months or six months if you thought he was crazy? A. No, sir, I sure wouldn't.

Mr. Allen: I believe that is all.

The Court: Call your next witness.

Mr. Moore: Your Honor, we would like, with the Court's permission, to ask for a brief recess. One of my witnesses is here and I haven't had an opportunity to talk to him.

The Court: Take the jury in the jury room.

(Court was in recess, after which the jury was returned and the following proceedings were had:)

Mr. Moore: Your Honor, we would like to call Mr. Hackler back to the stand.

187 The Court: All right, sir.

L. C. HACKLER, recalled, testified as follows:

Recross Examination by Mr. Moore:

Q. Mr. Hackler, I have just a couple of more questions to ask you. The date this offense was alleged to be committed, what day of the week was that, do you recall? A. I believe it was Friday.

Q. Did you know that this defendant had been previously convicted or been in the penitentiary before he came to reside in your house? A. I did.

Q. You said awhile ago that if you knew he was sane, or insane, you wouldn't have let him stay there, but you knew of this previous conviction. Now, the money was taken on Friday, is that right? A. I believe it was Friday.

Q. Did this defenndant come back to your house after the time the money was taken and before he was arrested? A. The next day, I believe it was.

Mr. Moore: That is all I have.

Mr. Allen: I believe that is all.

The Court: Call your next witness.

Mr. Moore: I would like to call Mr. Bay Simms.

188 P. L. SIMMS, after having been duly sworn, testified as follows:

Direct Examination by Mr. Moore:

Q. Please state you name to the court. A. P. L. Simms.

Q. Mr. P. L. Simms. Where do you reside, Mr. Simms? A. Do what?

Q. Where do you reside? A. I live about seven miles north.

Q. Do you reside or have a farm in the Ovilla community? A. Yeah.

Q. I asked you if you know Mr. Bush here. A. Sure do.

Q. The defendant in this case. A. Sure do.

Q. What is the occasion of your acquaintance with Mr. Bush? A. He worked for me last fall.

Q. What kind of worker was he? What did he do? A. Tractor driving.

Q. Tractor driving? A. Yes, sir.

Q. What kind of worker did you find him to be? A. One of the best I ever seen.

Q. He wasn't lazy in any way? A. No, he sure wasn't.

Q. He wasn't a malingerer?

189 Q. At the time he was working for you, did you know that he had previously been convicted? A. I sure didn't.

Q. Were you surprised to hear that he was? A. I was; I was.

Q. Did he make a fairly good salary with you, Mr. Simms? I mean, he had a steady job? That is what I am getting at. A. I worked him steady for about, oh, I wouldn't know, three or four months.

Q. As far as you know, did he have any apparent necessity to steal, if he did so steal? A. I wouldn't think so.

Q. In other words, he had a place to stay and he had a job with you and Mr. Hackler? A. He did; had a nice home.

Q. Now, the State has introduced in evidence here an judgment and indictment wherein they alleged—I believe this is it here—about—I don't know how many; with the State's approval I will just approximate it—ten or fifteen counts of theft or offenses related to theft. Now, could you give any opinion as to whether you think that this

man's actions—you observed him while he worked—whether or not he might be a klepto or mentally defective;

Mr. Allen: We object to that. Kleptomania is not a defense and this is not an expert witness.

Mr. Moore: As far as being an expert witness, a
190 lay witness is perfectly qualified to testify as to this fact under the law.

The Court: I will let him answer the latter part as to whether he is mentally defective or not.

A. I will put it no, I couldn't say.

Q. You couldn't say. But taking into consideration your observance of not only his working conditions and the fact he worked for you and how he worked, and in view of this, all related to theft, would you give your opinion, from your observation? A. Well, I had gas and oil setting around all the time and he never did steal anything from me that I knew of. He worked from daylight to dark; he didn't have time to steal when he was working for me, I'll tell you. I didn't ask him to, but he did. I mean, daylight to dark.

Q. Was he the type of individual you had to keep prodding to get him to work? A. No; I didn't want him to work so hard, but I couldn't keep him from working.

Mr. Moore: I believe that is all we have.

Mr. Allen: I believe that is all.

The Court: Call you next witness.

Mr. Moore: Your Honor, we don't have any witness, but we would like to move that the Court suspend the proceedings in this case until we send this man to a mental institution for closer observation, or in the alternative we
191 would move that the Court appoint a psychiatrist or psychologist, somebody competent in mental defects to examine this defendant and evaluate his mental condition in view of the previous conviction of the judgment of insanity.

The Court: I will appoint the county health officer.

Mr. Moore: We would prefer to have a person trained in the mind such as a psychiatrist or psychologist.

The Court: Overruled.

Mr. Moore: We except to that.

The Court: The defendant rests, I take it?

Mr. Moore: Yes, sir.

The Court: What says the State?

Mr. Parramore: The State recalls W. H. Bryant.

W. H. BRYANT, recalled, testified as follows:

Redirect Examination by Mr. Parramore:

Q. You are the same W. H. Bryant who testified a few minutes ago, a police officer from Fort Worth? A. Yes, sir.

Q. And you testified in connection with case No. 46490 against the defendant in the Criminal District Court of Tarrant County? A. Yes, sir.

Q. Which you said that he was convicted on February 18, 1946? A. Right, sir.

192 Q. What was the date of the commission of the offense for which that conviction was had in 46490? A. The date of the offense?

Q. Yes, sir. A. It happened on December 20.

Q. What year? A. 1945.

Mr. Parramore: I think that is all.

Mr. Moore: I don't have any questions.

The Court: Call your next witness.

Mr. Allen: Wayne McCollum.

WAYNE McCOLLUM, recalled, testified as follows:

Redirect Examination by Mr. Allen:

Q. You are the same Wayne McCollum that testified earlier today in this cause? A. That is right, sir.

Q. Sheriff, I believe you stated that you had known this defendant since October 22, last year. A. That is correct.

Q. I will ask you since that date if you have had an opportunity to observe and talk with this defendant. A. A lot of times.

Q. All right. I will ask you if you have an opinion as to whether or not he was of sound or unsound mind on

193 October 21, last year. A. Definitely.

Q. What is that opinion? A. He was of sound mind.

Q. All right. I will ask you, based on that same observation and conversation that you had with him on these numerous occasions, if you have an opinion as to whether

or not he is of sound or unsound mind today. A. In my opinion he is still of sound mind.

Mr. Allen: All right. I believe that is all.

Mr. Moore: I don't believe I have any questions.

Mr. Allen: Willis Cox.

WILLIS COX, recalled, testified as follows:

Redirect Examination by Mr. Allen:

Q. Mr. Cox, you are the same Willis Cox that testified earlier in this case? A. Yes, sir.

Q. And you are a deputy sheriff? A. Yes, sir.

Q. And you know the defendant. How long have you know him? A. Since October 22 of last year.

Q. Have you had occasion to see him, talk with him and observe him since that date? A. Yes, sir.

194 Q. I will ask you, Mr. Cox, if you have an opinion as to whether he is of sound or unsound mind today? A. Yes, sir.

Q. I will ask you what is that opinion? A. My opinion is that he is of sound mind.

Q. All right. I ask you if you have an opinion as to whether or not he was of sound or unsound mind on October 21 of last year? A. Yes, sir.

Q. What is that opinion, Mr. Cox? A. I am of the opinion that he was of sound mind at that time.

Q. I see. Now, the legal test for—

Mr. Moore: Your Honor, I object to that. I believe the Court's Charge will carry that.

The Court: Sustain the objection.

Q. All right. I will ask you, does the defendant, in your opinion, know right from wrong? A. In my opinion, yes.

Mr. Allen: I believe that is all.

Mr. Moore: You are a deputy sheriff, is that correct? A. Yes, sir.

Mr. Moore: That is all.

Mr. Allen: That is all, Mr. Cox. Thank you, sir. Dr. Compton, if he is here.

(Judgment marked for identification as State's Exhibit 16, the original of which exhibit accompanies this statement of facts.)

195 Mr. Moore: Your Honor, we object to this on the grounds that we feel the present jury is entirely capable of deciding the sanity or insanity of this defendant.

Mr. Allen: It is a certified copy of the judgment.

The Court: Overrule the objection.

Mr. Allen: I read to you a judgment that was entered yesterday.

(State's Exhibit 16 read to the jury by Mr. Allen.)

Mr. Moore: Your Honor, we would like to renew our objections to this judgment on the same grounds as those dictated yesterday with regards to the instructions given on the tests of insanity and the weight of the judgment of Navarro County to be considered by the jury.

The Court: I overrule the objection. I will permit him to introduce it.

DR. JOHN COMPTON, after having been duly sworn, testified as follows:

Direct Examination by Mr. Allen:

Q. State your name to the judge and jury, please, sir. A. Dr. John Compton.

Q. Where do you live, Dr. Compton? A. Waxahachie.

Q. Did you walk up the stairs? A. Yes.

Q. You should have ridden the elevator. Doctor,
196 what is your profession? A. Physician.

Q. How long have you been practicing medicine? A. Six years in Waxahachie.

Q. Would you just tell the court and jury what educational background you have in that respect? A. Been to the University of Baylor in Waco for four years and then the Universty of Texas Medical School in Galveston for four years and then internship in New York City for one year.

Q. I will ask you, Doctor, do you hold any official position in this county at this time? A. Ellis County Health Officer.

Q. Have you seen this defendant, James E. Bush? A. Yes, I have.

Q. When was the first time you saw him? A. Saw him in November, 1960, in my office.

Q. Did you examine him at that time? A. I examined him for lunacy at that time.

Q. Did you, upon examination, reach a conclusion or an opinion as to whether he was of sound or unsound mind? A. I felt he was of sound mind.

Q. Doctor, what opinion, if any, do you have as to his being of sound or unsound mind on October 21, of last year? A. I felt he was of sound mind then.

Q. When is the next time you saw this defendant? A. On April 21 of this year.

197 Q. Now, did you—Where was that? A. At the jail.

Q. Did you also examine him at that time? A. Yes.

Q. Now, did you form an opinion as to whether or not he was of sound or unsound mind at that time? A. Yes. I felt he was of sound mind.

Q. Now, upon that examination, do you have an opinion as to whether he is of sound or unsound mind today? A. I feel that he is.

Q. He is of sound mind? A. Of sound mind.

Mr. Allen: I believe that is all.

Cross Examination by Mr. Moore:

Q. Doctor, what sort of examination did you make of this patient? A. An examination of questioning him, as far as lunacy, as to his orientation.

Q. This is just whether or not he knows he is in the world today? A. No, sir; whether he is orientated in person, place or time.

Q. Is this the only examination that a psychiatrist or psychologist would give this man? A. As far as psychiatric examination, the questioning would be. Of course, you can go into complete physical examination.

198 Q. Doctor, have you had any extended work in psychiatry or psychology? A. I had psychiatry in medical school. I have had no specialty in psychiatry.

Q. Do you know how many years of specialized service you have to have— A. Four to six years.

Q. That is in addition to your medical degree? A. Medical school.

Q. Doctor, has mental science, in your opinion, grown like medical science has since 1843, when the right and wrong test was laid down? A. Certainly.

Q. There seems to be some differences of opinion on the length of time that a person should be examined, the types of tests given. Do you know anything about the ink blot test that the psychologists use? A. Yes.

Q. Was he given an ink blot test here? A. No.

Q. Do you have much occasion here in Ellis County to practice the diseases of the mind or to actually diagnose them? A. As far as psychiatric patients?

Q. Yes, sir. A. Yes.

Q. If you have a psychiatric patient here, do you call in other help or refer them to other doctors, or do you
199 treat this condition yourself? A. No, it is according to the extent of their difficulty. On a mild, emotional problem, I treat it myself; if it is more difficult, I refer it to a specialist.

Q. Doctor, are there some types of insanity where you cannot tell, one day a person will be completely sane and the next day they may kill somebody? A. Schizophrenia.

Q. If you were to examine today a person on the day that he happened to be "on," so to speak, you couldn't tell, by this orientation test you are talking about, could you tell whether or not he was schizophrenic? A. You could get some idea. These are different types of schizophrenia and they will give different answers.

Q. What about a paranoid type of individual? A. Yes, you could tell.

Q. All of these would come out in the orientation test? Is that your testimony? A. Yes; the paranoid feels everybody is against him, people doing harm, usually has halucinations, which this patient gave no indication of.

Q. But if you ask the man who the president of the United States was, or if he had any children or what his age was, by those questions there, would it come out? A. Not necessarily by that.

Q. Doctor, did you go into and examine him physically? A. No, I did not do a physical.

200 Q. Now, this man—We have introduced into evidence here a record where he was previously found

to be insane by a jury in Corsicana. Had you seen this judgment or did you know about this judgment before yesterday? A. I saw it yesterday. I had not seen it before that time.

Q. Does heredity have anything to do with insanity? A. There is a tendency toward it; the insanity itself is not inherited.

Q. Now, this psychosis, Doctor, what in your estimation is the definition of psychosis? A. A person that is not in contact with reality.

Q. Are there persons, doctor, who cannot control their emotions, like a kleptomanic? A. Yes, there are certain people.

Q. But on the surface they seem completely normal? A. Not always. They can have other emotional difficulties.

Q. These other emotional difficulties, would they come out on this test you were giving? A. If they had other emotional difficulty.

Q. It would come out on that. We have introduced in evidence here, the State has today, an indictment where this man hase been charged with I don't know how many different times, ten or fifteen different offenses, and I believe they are all either theft or related to theft. This line of crime, with the lack of anything such as, say, rape robbery, murder or anything else, does that indicate
201 anything to you? A. You mean as far as his stealing?

Q. As far as stealing is concerned, or emotions, or impulse or anything, like stealing automobiles and cattle and I believe bales of cotton. What I am getting at is, a hardened criminal or an habitual criminal type would usually go into something else, would he not. A. Well, these still have monetary value.

Q. What if he doesn't have any motive for it, seemingly, to steal? A. You mean he steals them and doesn't use them or sell them?

Q. Right. A. Well, then I'd say he had other emotional difficulties, if he is not stealing for a purpose or for his own needs.

Q. Well, Doctor, here is a man whose testimony was that on one day he allegedly committed theft of a certain

amount of money; he has been in prison before; he is a convict; he came back to that same house the next day; now he was living in the house with these people and they knew he was a convict. In this situation here, do you think he was sort of a school boy type—you know, most school boys, when they steal something, they will hide it—do you think a man of sound mind would come back there the next day when the people knew he was a criminal and they had fed him and stayed in the same house with him?

A. Well, a criminal will steal anyplace they have the chance.

Q. Well, do you think it unusual that he came back
202 there the next day? A. No, if he knew the place and what was accessible there.

Q. You do not see anything from this record here of a number of thefts and everything related to theft, but nothing related to murder, rape, robbery or any other crimes, to indicate that this man is emotionally upset? A. I found, as far as—

Q. Or mentally upset? A. I found no instance of him being of unsound mind.

Q. That is the legal test of right and wrong that you are applying? A. Yes.

Q. Doctor, in view of all these, in view of his previous insanity judgment, this is a question that you will have to answer and I don't know how you will answer it, against me or for me—but do you think that the person here, in view of all these convictions of theft and everything, should have some psychological examination of psychiatric examination with these tests to determine his behavior pattern, look into his past history all the way back and to check him out physically, whether or not he had any organic problems? Would you advise that? A. No, I wouldn't advise that expense to the state.

Q. Well, of course, now they have gone to a lot of expense here. Would you advise me, as defendant's counselor, to do it? A. That is up to you.

203 Q. That is not my question, Doctor. In view of this opinion right now,—I am just trying to say this one fact here—all the facts here today, is there any indication that this person is mentally unbalanced and would

those tests show it? Say a psychological test or the test given by psychiatrists or close observation throughout the day? A. As I said on my examination, I find no signs of him being of unsound mind, so I would see no need for the further tests.

Mr. Moore: I believe that is all I have.

Redirect Examination By Mr. Allen:

Q. Doctor, I think you answered all of my question in the last answer you gave. You found nothing that would indicate that he is out of contact with reality or that he is a kleptomaniac or suffering as a paranoid of any type, or anything like that? Is that true? A. That is true.

Q. I believe that is all.

Recross Examination by Mr. Moore:

Q. Doctor, one further question here. This man, was he ill when you first came to your office? A. No.

Q. Who sent him to see you? A. He was brought in from the jail for me to check him at that time for insanity.

Mr. Moore: I believe that is all.

204 Mr. Allen: That is all. Thank you very much Doctor. The State rests, Your Honor.

Mr. Moore: The defendant rests, Your Honor.

The Court: Both of you close, I take it?

Mr. Allen: Yes, sir.

Mr. Moore: Yes, sir.

The Court: Where is our bailiff? The bailiff will take you in the jury room and we will get to you just as quickly as possible, and then the case will be argued to you and then you can deliberate upon your verdict, so follow him, please, for the present.

205 STATE OF TEXAS
COUNTY OF ELLIS

I, Mary Cave, official court reporter of the 40th Judicial District of the State of Texas, do hereby certify that the above and foregoing 84 pages of typewritten matter constitute a transcript of the evidence, in question and answer form, in the cause of The State of Texas vs. James E.

Bush, No. 10902, in said court; and I do further certify that such transcript is true and correct.

Witness my hand this 8th day of June, 1961.

/s/ MARY CAVE

APPROVED:

Attorney for State

/s/ BILLY J. MOORE
Attorney for Defendant

/s/ A. R. STOUT
Judge Presiding

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206 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS
40TH JUDICIAL DISTRICT

No. 10902

THE STATE OF TEXAS

v.

JAMES E. BUSH

Supplementary Statement of Facts

Filed
At ..... M
Jul 26, 1961

MRS. JAKE TALLEY
Clerk Dist. Court, Ellis County, Texas

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

Aug. 7, 1961

GLENN HAYNES
Clerk

207 **Transcript of Hearing on Motion for Extension of Time—July 15, 1961**

JUDGE PRESIDING:

Honorable A. R. Stout
40th Judicial District
Ellis County
Waxahachie, Texas

Appearances:

For the State
Bruce Allen
Courthouse
Waxahachie, Texas

For the Defendant
Billy Moore
Ennis, Texas

208 The Court: All right. Proceed.

Offer in Evidence

Mr. Moore: Your Honor, on this motion for extension of time under Rule 755 for time for filing motion and also time for filing amended motion, we would like to introduce in evidence the indictment rendered in Cause No. 18000, rendered by the Grand Jurors for the Court of Johnson, State of Texas, in the February term of 1948.

The Court: Doesn't the instrument speak for itself?

Mr. Moore: Yes, sir, it does.

The Court: Hand it to the court reporter and let her have it.

Mr. Moore: We would like to introduce in evidence and state for the Court these charges in Eastland County and Charges in Tarrant County had been used in cause No. 18000 for the purpose of enhancing the punishment of the said James E. Bush, and that —

The Court: Well, do you have any other instruments to offer?

Mr. Moore: No, sir, I don't, but this is the evidence with regard to the fact that this cause No. 18000 had been sub-

mitted to the Court of Criminal Appeals after he had served eight years on the sentence that resulted from this, and it was reversed and remanded and that was ex parte: Bush, 313 Southwestern 2d, 287. We feel like under the law these two indictments have been used previously for enhancing the punishment and the man has served time under them and under the law they are not entitled
209 to be used again for the purpose of enhancing the punishment as to this cause no. 10902.

Mr. Allen: Judge, I don't have anything to offer except to say this case was reversed and the same cases offering the indictment was the one that the defendant was tried in Johnson County on and it was reversed and remanded and it was never retried.

The Court: I overrule your motion, Counselor.

Mr. Moore: We would like also to state that this Eastland case was also used in the Tarrant County indictment.

The Court: Well, do you know anything about that, Mr. Allen?

Mr. Allen: I didn't hear it.

The Court: He said he wanted also to state this Eastland case was used in the Tarrant County indictment.

Mr. Allen: Now, judge, I would say this, I don't have—See, we sent our certified copies, the court reporter took those and I don't have a certified copy to check the judgment and the sentence and the indictment in the case he refers to in Fort Worth, but as I recall, the defendant went down to the penitentiary for five years, I think they sent him, on the first count in the Tarrant County case, to wit, that theft of cream.

The Court: That is my recollection.

Mr. Allen: But we didn't use any of the subsequent convictions up there in the Tarrant County case, cause No. 46490, as I recall.

210 The Court: What have you offered in testimony, Mr. Moore? You have offered a Cleburne indictment and have you offered another indictment?

Mr. Moore: Your Honor, we feel—

The Court: Answer my question. I don't care what you feel. I am sympathetic with you but that is not the law on the question either way. What have you offered in testimony before me? What have you got?

Mr. Moore: We have offered in evidence—

The Court: What does the court reporter have? One indictment? I overrule your motion and note your exception.

Mr. Moore: Note our exception.

The Court: I believe that is it, isn't it?

(Certified copy of Bill of Indictment in Cause No. 18000, The State of Texas vs. James Edgar Bush, in the District Court of Johnson County, Texas, marked for identification as Defendant's Exhibit No. 1, the original of which exhibit is attached to this supplementary statement of facts.)

211 THE STATE OF TEXAS
COUNTY OF ELLIS

I, Mary Cave, official court reporter in and for the County of Ellis, State of Texas, do hereby certify that the above and foregoing 4 pages of typewritten matter constitute a transcript of the evidence hearing on the motion for extension of time in the cause of The State of Texas vs. James E. Bush, No. 10902, in said court; and I do further certify that such transcripts is true and correct.

Witness my hand this 19th day of July, 1961.

/s/ MARY CAVE

Approved:

/s/ BRUCE ALLEN
Attorney for State

/s/ BILL J. MOORE
Attorney for Defendant

Judge Presiding

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212 **Defendant's Exhibit No. 1**

213 IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS FOR THE COUNTY OF JOHNSON AND STATE aforesaid, duly selected, organized, sworn and empaneled as such at the February Term, A.D. 1948 of the District Court for said County, upon their oaths in said Court

present that James Edgar Bush on or about the 12th day of August, A.D., one thousand nine hundred and forty-seven and anterior to the presentment of this indictment, in the County of Johnson and State of Texas, did then and there unlawfully and fraudulently take eleven head of cattle belonging to Bob Wooten from the possession of the said Bob Wooten without the consent of the said Bob Wooten and with the intent then and there to deprive the said Bob Wooten of the value of the same and to appropriate the same to the use and benefit of him, the said James Edgar Bush:

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present in and to said court that prior to the commission by the said Defendant of the offense hereinbefore alleged the said Defendant was two times convicted of felonies committed prior to the commission of the offense hereinbefore alleged as follows, to-wit:

On the 12th day of November, A.D. 1941, in the 88th District Court of Eastland County, in the State of Texas, the said defendant, under the name J. E. Bush, was duly and legally convicted in cause number 10,330 of the felony of Theft of Property over the value of fifty dollars said offense being then and there a felony less than capital, upon an indictment then legally pending in said court, and said court then and there had jurisdiction of said cause;

On the 18th day of February, A.D. 1946, in the Criminal District Court of Tarrant County, in the State of Texas, the said Defendant was duly and legally convicted in cause number 46490 of the felony of Theft of property of the value of over Fifty dollars, said offense being then and there a felony less than capital, upon an indictment then legally pending in said named court, and said court then and there had jurisdiction of said cause, which offense was committed subsequent to the conviction in cause number 10,330 in the 88th District Court of Eastland County, Texas, as aforesaid, and as hereinbefore alleged; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

/s/ W. A. TAYLOR
Foreman of the Grand Jury

214 THE STATE OF TEXAS
COUNTY OF JOHNSON

I, LILLIAN ASHCRAFT, Clerk of the District Court of Johnson County, Texas, do hereby certify that the foregoing is a true and correct copy of the original Bill of Indictment, filed in said Court on the 11 day of March A.D. 1948.

Given under my hand and seal of said Court at office in Cleburne, Texas this 13th day of July, A.D. 1961.

LILLIAN ASHCRAFT

18000

THE STATE OF TEXAS

VS.

JAMES EDGAR BUSH

INDICTMENT

Offense: Cattle Theft

JOHN A. JAMES, JR., *Attorney*

Filed 11 day of March, 1948.

EUNICE BEAVER, *Clerk*

By: L. ASHCRAFT

A True Bill

W. A. TAYLOR, *Foreman of Grand Jury*

Amount of Bail $1000.00
P.J.J.

Names of Witnesses

1. Bob Wooten, 908 W. 2nd St., Ft. Worth, Texas
2. Ivy Little, 2700 N. Main St., Ft. Worth, Texas
3. Lewis Gilstrap, Mansfield, Texas
4. Ed Ruckman, City Detective
5. Chas. E. Smith, City Detective, Ft. Worth, Texas
6. Capt. James H. Knapp, Asst. D.A., Ft. Worth (identity)

7. Otis Mayes & W. H. Bryant, City Hall, Ft. Worth, (identity)

8. Earl Conner, Jr., Atty., Eastland, Texas (identity)
9. Tug Underwood, Ft. Worth, (identity)

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244 **State's Exhibit 16**

Certified copy of judgment in insanity hearing in cause No. 10902, The State of Texas vs. James E. Bush, in the 40th District Court of Ellis County, Texas

245 IN THE DISTRICT COURT OF ELLIS COUNTY, TEXAS,
40TH JUDICIAL DISTRICT

No. 10902

THE STATE OF TEXAS

vs.

JAMES E. BUSH

Be it remembered that on this April 24, 1961, came on to be heard the above styled and numbered cause wherein the defendant filed his motion requesting that it be determined by the Court and jury whether he was sane or insane at the time of the commission of the alleged act by him on October 21, 1960, and also whether he is sane or insane at this present time; and both the State and defendant having announced ready for trial upon such preliminary matter, and a jury having been duly selected, impaneled and sworn, and after the evidence was adduced and the charge of the Court delivered in writing and argument had by counsel on both sides, the jury after deliberation returned into open court the following verdict, to wit: "We, the jury, find the defendant to be sane at this time. V. B. Hart, Foreman," and "We, the jury, find the defendant to have been sane on October 21, 1960. V. B. Hart, Foreman."

Based upon said above verdict of the jury, it is therefore ordered, adjudged and decreed by the Court, as determined by said jury verdict, that the defendant, James E.

Bush is now sane and that he was also sane on October 21, 1960, which is the date of the alleged offense pending against him.

Said preliminary hearing having been adverse to said defendant, James E. Bush, it is therefore ordered, adjudged and decreed that he stand trial upon the indictment for the offense which is alleged to have been committed by him on October 21, 1960.

/s/ A. R. STOUT
Judge Presiding

S – 16
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246 CLERK'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF ELLIS)

I, MRS. JAKE TALLEY, Clerk of the District Court of Ellis County, Texas, do hereby certify that the above and foregoing is a true and correct copy of Judgment in Cause No. 10902, entitled THE STATE OF TEXAS vs. JAMES E. BUSH as the same appears from the original now filed in my office and of record in Volume I, Page 628, Minutes of the District Court of Ellis County, for the 40th Judicial District of Texas.

GIVEN UNDER MY HAND AND SEAL of said Court, at office in Waxahachie, Texas, this the 25th day of April, A. D. 1961.

MRS. JAKE TALLEY
Clerk of the District Court,
Ellis County, Texas

(SEAL) By /s/ FRANCES PHILLIPS *Deputy*

247 **Defendant's Exhibit 1**

Certified copy of lunacy judgment in Cause No. 3387, The State of Texas vs. James E. Bush, in the County Court of Navarro County, Texas

THE STATE OF TEXAS,)

IN THE COUNTY COURT,
IN LUNACY

the 14 day of Feb 18[illegible]

[illegible] Feb 18[illegible] came on for hearing before the Hon

[illegible] County Judge of [illegible] County, Texas, a complaint in writing and under oath

[illegible] Rueb

[illegible] Rueb

[illegible] County hereinafter named, who were duly empaneled

[illegible] County Judge returned their verdict in response to the

THE STATE OF TEXAS,)

[illegible])

[illegible] Rueb

INQUIRY OF LUNACY

[illegible]

in person, and also came a jury of six good and lawful men of Navarro County, hereinafter named, who were duly empaneled and sworn according to law, and who having heard the complaint, the evidence and charge of said Judge, returned their verdict in response to the special issues submitted to them as follows, to-wit:

THE STATE OF TEXAS, } No. 3387 INQUIRY OF LUNACY
James E Burk }

The following special issues are submitted to the jury in the above entitled cause:

1st. Is James E Burk the defendant, of unsound mind?

2d. If the defendant is of unsound mind, is it necessary that he be placed under restraint?

3d. If you answer both the foregoing questions in the affirmative, then what is the age and nativity of the defendant?

4th. How many attacks of insanity has he had, and how long has the present attack existed?

5th. Is insanity hereditary in the family of the defendant or not?

6th. Is the defendant possessed of any estate, and if so, of what does it consist, and its estimated value?

7th. If the defendant is possessed of no estate, are there any persons legally liable for his support? If yea, name them

Upon the above special issues the jury finds as follows:

1st. Yes

2d. Yes

3d. 24 - American - White

4th. About 15 or about 6 months

5th. No

6th.

7th.

Signed:

J F Cudlman
W J McFadden
J E Marlow
John W Burns
H L Leathers
W Harris

JURORS

149

249 Whereupon, it is adjudged that the said James E. Bush is a lunatic, and it is ordered by the Court that he be conveyed to the Lunatic Asylum at ..... Texas, for restraint and treatment and that the costs of this proceeding be adjudged against Navarro County

It is further ordered by the Court that the above named jurors be allowed the sum of 50/100 Dollars each for which let scrip issue.

A. P. Mays
County Judge, Navarro County, Texas

Attest:

W. F. Harvard *Clerk*

By ..... *Deputy*

Subsequent Proceedings.

Transcript forwarded to San Antonio; Austin; Terrell, Wichita Falls; Rush on the 14 day of Feb. 1924

Fee Bill

No. ..... Ex Parte .....

County Judge Fees	3 00	Forward	
County Clerk Fees	4 50	Juror	
County Attorney Fees	5 00	Juror	
Sheriff Fees	5 00	Juror	
Justice of the Peace Fees		Juror	
		Juror	
		Juror	
Forward	17 50		

Conveying to Asylum .... days @ $2.00
Guard .... days @ $2.00
Guard .... days @ $2.00
Traveling expenses conveying lunatic to asylum, viz.....
tickets @ .....
Traveling expenses returning for attendant
tickets @ .....
Hack hire $ ..... Hotel Bills $ .....
Total .....

250 THE STATE OF TEXAS }
County of Navarro }

I, HARRY F. CHESTNUT, Clerk of the County Court in and for the County of Navarro, State of Texas, do hereby certify that the above and foregoing is a true and correct copy of Judgment In Re: State of Texas vs. James E. Bush, Cause No. 3387 as same appears on record in the office of County Clerk, Navarro County, Texas, in Volume 3, Page 37, Lunacy Judgment Records

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 14 day of April A. D. 1961.

(SEAL) HARRY F. CHESTNUT
County Clerk, Navarro County, Texas

By /s/ CAROLYN J HUMPHRIES *Deputy*

---

251 (File endorsement omitted)

252 IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

No. 33,890

JAMES E. BUSH, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

Appeal from Ellis County

Opinion—January 3, 1962

The conviction is for felony theft with two prior convictions for felonies less than capital alleged for enhancement; the punishment, life imprisonment, as provided by Art. 63, V.A.P.C.

The indictment was returned by the grand jury on February 7, 1961 and charged theft of money of the value of Five Hundred Dollars from one L. C. Hackler.

After return of the indictment, appellant filed in the cause, on April 21, 1961, two motions in which he alleged

that he had been adjudged a lunatic on February 14, 1924, in the County Court of Navarro County and that his attorney had reason to believe that appellant was presently insane and was insane at the time of the commission of the offense. In one motion, appellant requested the court to send him to a mental institution for diagnosis and observation before being placed on trial and in the other motion, appellant requested the court to, ". . . appoint and pay for a competent independent psychiatrist's services so that the Defendant can adequately prepare his defense . . . and for suspension of the proceedings for a period of time sufficient to enable the psychiatrist to observe, diagnose, and evaluate the Defendant's mental condition . . ."

The two motions were by the court overruled.

On April 24, 1961, appellant filed in the cause a motion for a preliminary insanity hearing in which he alleged that he was incompetent at the time to make a rational defense and requested the court to impanel a jury to try the issue of his mental competency at such time and at
253 the time of the alleged commission of the offense charged against him.

In response to the motion, a jury was duly selected and impaneled by the court on April 24, 1961, to try the issue of appellant's insanity.

After a hearing, the jury returned into court their verdict finding appellant sane at the time of the hearing and sane on October 21, 1960, the date the offense was alleged to have been committed.

On April 25, 1961, the case against appellant for the offense charged in the indictment was called for trial.

Appellant entered a plea of "Not Guilty" to the indictment by reason of insanity.

At the trial is was shown by the testimony of the injured party that on the date alleged in the indictment a collection of old coins, of the value of $600, were stolen from his home. Appellant was arrested the following day and some old coins were found in his pickup. Appellant orally confessed to the officers that he had stolen the coins from the injured

party and accompanied them to a place where he stated he had abandoned a metal box which contained the coins and had burned some of the papers which were in the box. At such place the officers found a metal box which the injured party identified as the box in which he kept the collection of coins. Certain coins and papers were also found by the officers. The coins were identified by the injured party and his wife as similar to the ones stolen from their home and the wife identified certain writing on coin wrappers as being her writing. The coins recovered by the officers, which were in denominations of pennies, nickels, dimes and quarters, were shown to have a value of over $50.

Proof was made by the State of the two prior convictions alleged in the indictment and evidence was introduced showing that appellant was the person so convicted.

Appellant offered in evidence, on the issue of insanity, a certified copy of a judgment entered in Cause No.
254 3,387 in the County Court of Navarro County, on February 14, 1924, wherein appellant was adjudged to be a lunatic in a lunacy proceeding.

The State called lay witnesses who expressed their opinion that appellant was of sound mind, both at the time the offense was alleged to have been committed and at the time of trial. Dr. John Compton, a physician and County Health Officer of Ellis County, upon being called as a witness by the State, testified that he had examined appellant on two occasions and expressed his opinion that appellant was a person of sound mind at the time of trial and on the date of the offense was alleged to have been committed.

The court, in submitting the issue of appellant's guilt to the jury, charged on the law pertaining to appellant's defense of insanity and required the jury to find whether appellant was sane or insane, both at the time of trial and at the commission of the alleged offense.

The jury by their verdict found appellant guilty of the primary offense and that he had been previously convicted of the two alleged felony offenses and on the issue of

insanity found appellant sane, both at the time of trial and on the date the offense was alleged to have been committed.

The evidence is sufficient to support the jury's verdict.

We shall discuss the contentions presented by appellant in his brief and in oral argument.

He first contends that the charge given by the court both at the preliminary trial and on the main trial, with respect to the definition of insanity, as applicable to the time of trial, was erroneous because the court's definition was based upon the "right and wrong" test of insanity rather than whether appellant knew the nature and consequences of his acts and was able to advise and assist his counsel in paring a rational defense.

255 We need not pass upon the sufficiency of the court's charge given at the preliminary trial as no appeal lies from such trial. Appellant may not on this appeal complain of alleged procedural errors at the preliminary trial. Pena vs. State, Tex. Cr. App., 320 S.W. 2d 355.

The court in the instant trial instructed the jury in connection with the charge on insanity as follows:

> "In order for a person to be insane under the law, his mind must be so affected or mentally diseased that his reason is dethroned to the extent that he does not know the nature, quality, or consequences of his act at the time, that is, he does not know the difference between right and wrong."

The "right and wrong" test of insanity, used by the court in the definition, is the legal test of insanity in this State. Simpson vs. State, 163 Tex. Cr. R. 385, 291 S.W. 2d 341 and Freeman vs. State, 166 Tex. Cr. R. 626, 317 S.W. 2d 726.

Art. 932b, V.A.C.C.P., provides in part as follows:

> "Section 1. In any case where the question of the insanity of a defendant is raised and the issue is tried alone before the main charge or is tried in connection with the main charge, the jury shall state in their

verdict whether the defendant was sane or insane at the time the offense is alleged to have been committed and whether the defendant is sane or insane at the time of the trial."

This statute clearly requires a finding by the jury on both the issue of present insanity of the accused and insanity at the time of the alleged offense, where such issues are raised.

In the early case of Guagando vs. State, 41 Tex. 626, it was held that the question to be determined at a preliminary insanity hearing is whether the accused is mentally competent to make a rational defense. Whereas in this case, an accused has been accorded a preliminary insanity hearing on the day before the main trial, the court would not be required to grant him another such hearing on the day of the main trial. Kizzee vs. State, 166 Tex. Cr. R. 191, 312 S. W. 2d 661.

We hold that the learned trial judge correctly submitted to the jury the issue of appellant's insanity, both at the time of commission of the offense and at the time of
256 trial, upon the legal test of insanity recognized in this State, which is the ability to know the nature and consequences of one's acts and the difference between right and wrong.

Appellant next urges as error the court's action in refusing to provide appellant with a competent independent psychiatrist, or in the alternative to send appellant to a mental hospital for observation.

The Constitution of Texas, Art. 1, Sec. 15a, relates to the commitment of one found to be insane. It does not relate to insanity as a bar to prosecution or as a defense in a criminal case. A defendant in a criminal case may successfully plead insanity as a bar to prosecution or punishment, or as a defense, though the evidence may not be such as would authorize his commitment.

We find no provision in the constitution or statutes which requires a court to appoint a psychiatrist for one charged with a crime or order that he be sent to a hospital for

observation. In Ellzey v. State, 158 Tex. Cr. R. 604, 258 S. W. 2d 211, this Court held that the law of this State does not require a trial court to send a person charged with an offense, prior to an adjudication of insanity, to an institution for diagnosis or observation. The prior adjudication of insanity of appellant, in the lunacy proceeding, would not require such an order. We find no error in the court's refusal.

Complaint is made to the court's action in refusing appellant's request for an extension of time in which to file an amended motion for new trial based upon newly discovered evidence. While the complaint is not before us by a proper bill of exception, we observe that appellant's request was not made until after the term of court had expired at which his original motion for new trial was overruled and notice of appeal was given. The court was without jurisdiction after expiration of the term to grant appellant's request for extension of time. Stickney vs. State, Tex. Cr. App., 336 S. W. 2d 133.

The remaining complaint relates to certain other alleged errors in the court's charge given at the preliminary insanity hearing which appellant cannot urge on this appeal. Pena vs. State, supra.

Finding the evidence sufficient to support the conviction and no reversible error appearing; the judgment is affirmed.

DICE, *Judge*

(January 3, 1962)
Opinion approved by the Court.

258 IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS, AUSTIN, TEXAS

No. 33,890

JAMES E. BUSH, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

Appeal from Ellis County

Affirmed Opinion by Judge Dice
Judgment—January 3, 1962

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

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259 (File endorsement omitted)

260 IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 33,890

JAMES E. BUSH

v.

THE STATE OF TEXAS

Appellant's Motions for Rehearing—Filed January 18, 1962
Appeal From Ellis County

Now comes the appellant and moves the court to set aside the judgment of affirmance rendered and entered herein on the 3rd day of January, A. D. 1962, and grant a rehearing of this cause, for the following reasons, to-wit:

FIRST

The decision of the court that there was no error in denying appellant's repeated requests for adequate psy-

chiatric evidence is a denial of appellant's rights to due process of law and equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

SECOND

The decision of the court that there was no error in the trial court's instruction on the issue of insanity does not dispose of appellant's contentions that there are three distinct tests of insanity.

Appellant states that the name of the opposing counsel in this cause is BRUCE ALLEN, and he resides in Waxahachie, in Ellis County, Texas, and he prays that notice of this motion be served in accordance with law.

s. BILLY J. MOORE
Attorney for Appellant
Box 19
Ennis, Texas

Note of Clerk:

The 14 pages of DISCUSSION following this motion have been omitted

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(File endorsement omitted)

261 IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

No. 33,890

JAMES E. BUSH, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

Appeal from Ellis County

262 **Opinion on Motion for Rehearing—**
Delivered February 14, 1962

In a highly professional brief and oral argument, appellant urges that we were in error in our original holding

that he was not under the Constitution of the United States entitled to the appointment of a psychiatrist, to be compensated by the State for his examination of appellant and for his time while testifying, in the event he concluded that appellant was a person of unsound mind. This Court does not turn a deaf ear to appellant's claims of his constitutional rights, as will be seen from our opinion in which we granted relief to him in Ex parte Bush, 313 S.W. 2d 287. But we are not inclined to extend the holding of the Supreme Court of the United States in U.S. ex rel Smith v. Baldi; 344 U.S. 561, 73 S. Ct. 391, 97 L. ed. 549, when that Court said, "We cannot say that the State has that duty by constitutional mandate."

Appellant next contends that we erred in our disposition of his complaint as to the court's charge on the question of insanity. What we attempted to say was that the question of appellant's sanity, and thus his ability to make a rational defense, was decided adversely to him on April 24 and that it became unnecessary to re-adjudicate that question on April 25.

Remaining convicted that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

MORRISON, *Judge*

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263 IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

No. 33,890

JAMES E. BUSH, *Appellant*
vs.
THE STATE OF TEXAS, *Appellee*

Appeal from Ellis County

Minute Entry of Order Overruling Motion for Rehearing—February 14, 1962

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

264 (Clerk's Certificate to foregoing transcript omitted in printing)

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265 **Clerk's Certificate**

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in our Cause No. 33,890, styled

JAMES E. BUSH, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*,

judgment of the District Court of Ellis County was affirmed January 3, 1962, Appellant's Motion for Rehearing overruled February 14, 1962, and mandate issued March 3, 1962.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on February 14, 1962, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas in criminal cases, and said judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 11th day of April, A. D. 1962.

GLENN HAYNES
Glenn Haynes
Clerk, Court of Criminal Appeals of Texas.

(SEAL)

SUPREME COURT OF THE UNITED STATES

No. 75 Misc., October Term, 1962

JAMES E. BUSH, *Petitioner*,

vs.

TEXAS

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—October 15, 1962

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of the State of Texas.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 511.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MOTION FILED DEC 26 1962

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

CHARLES W. WEBSTER,
Southern Methodist Law School,
Dallas, Texas.

GEORGE SCHATZKI,
1601 National Bankers Life Building,
Dallas, Texas,
Attorneys for American and Dallas Civil Liberties Unions.

WARLICK PRESS, INC.—2203 VALDINA STREET—DALLAS—ME 1-3130

47

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Justices of the Court:

Comes now the American Civil Liberties Union and its affiliate, the Dallas Civil Liberties Union, and moves for leave to file a brief of an *amicus curiae* in support of the position of Petitioner in the instant case.

In support of said motion, movants state that both are associations dedicated to the protection and advancement of all civil liberties as guaranteed by the Bill of Rights and Fourteenth Amendment to the United States Constitution.

The instant case involves problems which face all indigent defendants in criminal matters. The State refused to supply the indigent defendant psychiatric care and observation although the defendant pleaded (1) incompetency to stand trial, and (2) insanity as a defense. He was accordingly convicted without any qualified expert psychiatric testimony being presented to the jury. He was sentenced to life imprisonment.

The instant case raises broad problems of due process of law and/or equal protection under law, and the solution to said problems will have effects reaching far beyond the rights of the petitioner involved in this case.

Movants also respectfully request that their brief of an *amicus curiae* be filed on or before January 11, 1963.

WHEREFORE, the movants respectfully request leave to file a brief of an *amicus curiae* on or before January 11, 1963, in support of the position of the petitioner.

Respectfully submitted,

CHARLES W. WEBSTER,
Southern Methodist Law
School,
Dallas, Texas.

GEORGE SCHATZKI,
1601 National Bankers Life
Building,
Dallas, Texas,
Attorneys for American and
Dallas Civil Liberties Unions.

CERTIFICATE OF SERVICE

I do certify that a copy of the Motion for Leave to File Brief Amicus Curiae has been sent by United States Airmail to Charles Alan Wright, attorney for the petitioner, at 2500 Red River, Austin 5, Texas; and to Will Wilson, Attorney General of the State of Texas, Capitol Building, Austin, Texas.

CHARLES W. WEBSTER

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 4 1963
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE PETITIONER

CHARLES ALAN WRIGHT
2500 Red River Street
Austin 5, Texas

BILLY J. MOORE
Citizens National Bank Building
Ennis, Texas

Attorneys for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE PETITIONER

Citations to Opinion Below

The opinions of the Texas Court of Criminal Appeals (R. 152-157, 159-160) are reported at 353 S.W.2d 855.

Jurisdiction

The judgment of the Texas Court of Criminal Appeals was entered on January 3, 1962 (R. 158). A timely petition for rehearing filed on January 18, 1962 (R. 158-159) was denied on February 14, 1962 (R. 160). The judgment is final and is from the court of last resort in Texas in criminal cases (R. 161). A motion for leave to proceed *in forma pauperis* and a petition for certiorari were filed May 7, 1962, and granted October 15, 1962 (R. 162). The juris-

diction of this Court rests on 28 U.S.C. §1257(3), since petitioner claims a right under the Constitution of the United States.

Question Presented

Does the Fourteenth Amendment require in a criminal prosecution of an indigent defendant previously adjudicated to be insane that the court commit him to a mental hospital for examination, or provide funds for employment of a psychiatrist, or otherwise make available to the jury and to court-appointed counsel for the defendant psychiatric evidence as to the defendant's present sanity?

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was convicted of felony theft in the District Court of Ellis County, Texas. There was evidence from which the jury could have found that petitioner stole a collection of old coins, worth about $600, from his employer (R. 93). On proof of two prior convictions for theft, petitioner was sentenced to life imprisonment as an habitual offender (R. 17-19).

On February 14, 1924, petitioner, then 24 years old, was adjudicated to be insane by a jury in Navarro County, Texas. The jury found that insanity was hereditary in petitioner's family, that he had had about 15 attacks of insanity in the preceding six months, and that it was necessary that he be placed under restraint (Def. Ex. 1; R. 147-152, 123). This judgment that petitioner was insane has never been vacated or otherwise set aside (R. 54).*

The crime in question was alleged to have taken place on October 21, 1960 (R. 2). An indictment was returned February 7, 1961 (R. 1-3) and trial was set for April 24, 1961. About three weeks before the date set for trial the court appointed an attorney for petitioner, who was indigent (R. 34). On April 21st the court-appointed attorney made two motions. In each he recited petitioner's prior adjudication as insane, and that petitioner was without funds to pay for psychiatric tests, examinations, and evaluations necessary to his defense of insanity. In the first motion he asked that petitioner be sent to a mental institution for diagnosis and observation before being placed on trial (R. 3-4). In the other motion he asked alternatively that the court appoint and pay for a competent independent psychiatrist's services (R. 5-6). Both motions were refused. In the trial judge's words: "Nothing showed the defendant to be insane and the Court had no fund or money for so-called psychiatrists, alienists, quacks or specialists" (R. 38).

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* In post-trial proceedings the trial judge twice stated (R. 35, 38) that after being adjudicated insane in 1924, petitioner was released from the state hospital after a very short time and "pronounced sane at all times." There is no evidence in the record to that effect. The County Attorney twice attempted to suggest such a state of facts by leading questions to witnesses (R. 52, 64), but in each case the witness answered that he did not know this to be the fact.

On April 24th, the date set for trial, petitioner availed himself of his right under Texas law to a preliminary trial on the issue of his mental competency at the time of trial and at the time of the alleged commission of the offense charged (R. 6). The jury for this hearing found petitioner to be sane both then and when the alleged crime was committed (R. 8). To rebut the presumption of continuing insanity which, under applicable Texas law, arose from the unvacated 1924 adjudication (R. 7), the state introduced testimony that petitioner was sane from the sheriff (R. 53-54), a police captain (R. 66), a deputy sheriff (R. 67-68), and a Dr. John Compton, the county medical officer (R. 57-65). Dr. Compton based his testimony on two limited consultations with petitioner, one in the doctor's office and one in the jail (R. 57-58). He testified that his studies in medical school had included psychiatry, but that he had no specialized training in that field (R. 64). At the trial on the merits Dr. Compton also testified that in his private practice he treats patients with a mild emotional problem himself, but that he refers more difficult psychiatric cases to a specialist (R. 136). At this preliminary hearing the defense offered the testimony of Dr. James A. Dyal, an assistant professor of psychology at Southern Methodist University (R. 68-74). Dr. Dyal, who had agreed to come to the trial with no fee except his gasoline expenses (R. 74), was permitted to examine petitioner for only 20 minutes (R. 70), since the court required that the examination be made during a brief luncheon recess (R. 65). Dr. Dyal testified that on the basis of such an inadequate examination he could not give an opinion as to petitioner's sanity (R. 70).

The trial on the merits was held on the following day, April 25th (R. 90). On the issue of insanity, the evidence was the same as at the preliminary hearing, except that:

the testimony of the jailer that petitioner was sane (R. 124-125) was substituted for the testimony of the police captain who had ventured this guess a day before; the psychologist, Dr. Dyal, was not recalled; and the state was permitted to read into evidence the judgment that petitioner was sane resulting from the sanity hearing the day before (State Ex. 16; R. 146-147, 133-134). The principal testimony on sanity again came from the county medical officer, Dr. Compton, and was similar to his testimony at the preliminary sanity trial (R. 134-139). During the trial on the merits the defense moved that proceedings be suspended until petitioner could be sent to a mental institution for closer observation, or in the alternative that the court appoint a psychiatrist or psychologist to examine petitioner and evaluate his mental condition in view of the 1924 judgment of insanity. The court responded by saying that he would appoint the county health officer, Dr. Compton, who had testified for the state the day before and was about to testify for the state again (R. 131). So far as the record shows, this "appointment" was not taken seriously by anyone concerned, and Dr. Compton made no further examination of petitioner.

The jury found petitioner guilty and he was sentenced to life imprisonment (R. 17-19). A motion for new trial, in which the refusal to provide for psychiatric examination of petitioner was assigned as error (R. 20), was denied (R. 22). The Court of Criminal Appeals affirmed the conviction (R. 152-160), and specifically rejected petitioner's claim that the Fourteenth Amendment gave him the right to some form of psychiatric assistance (R. 159-160).

Summary of Argument

I. Petitioner, having been adjudicated to be insane in 1924, is presumed insane under Texas law. The only testimony in the present proceeding as to his sanity, on the basis of which the jury found him sane, was from lay witnesses and from the county medical officer, who lacked any specialized training in psychiatry. The symptoms of insanity are elusive and often deceptive. There is a substantial consensus, not only among medical experts but also among legal writers and courts, that a doctor without specialized training in psychiatry is not competent to detect these symptoms and to determine the sanity of a criminal defendant. Even where examination is made by a qualified doctor, the examination must be of substantial duration and include a variety of diagnostic procedures. The two limited "consultations" the county medical officer had with petitioner were not sufficient to determine petitioner's mental condition, even if the officer had had the necessary training and experience to form an opinion on this subject.

II. It is widely recognized that the only satisfactory procedures for determining the sanity of an accused person are his commitment to a mental hospital for observation, or the appointment of qualified psychiatrists to examine him. In 23 states, as well as in the federal courts and the District of Columbia, statutes provide for one or both of these methods of examination, while 10 other states provide by statute for the appointment of qualified persons to examine a defendant as to his sanity but do not specify that the examination must be by psychiatrists. These statutes have been widely praised as a valuable aid to justice by the courts which administer them and by those who have observed these procedures in operation. Every professional

group, whether legal or medical, which has studied the determination of sanity in criminal cases recommends one or both of these procedures.

III. The Fourteenth Amendment requires that the states give a criminal defendant an adequate opportunity to sustain the plea of insanity. Where the defendant is without funds to retain psychiatrists, the state must make provision for psychiatric examination of the defendant if he is to have such an opportunity to sustain his plea. A proceeding which finds a man sane, and results in a life sentence to the penitentiary, in the absence of any qualified expert evidence as to his sanity, is lacking in fundamental fairness. The right to court-appointed counsel of an indigent in such a case is meaningless if counsel is without funds to obtain, and the court refuses to provide, the kind of evidence which is indispensable to a just resolution of the sanity issue. Failure to provide for psychiatric examination where defendant is indigent makes the plea of insanity a "rich man's defense." Where the kind of trial a man gets depends on the amount of money he has, there is a denial of equal protection of the laws.

ARGUMENT

I.

In the Absence of Psychiatric Testimony Based on an Adequate Examination, No Meaningful Judgment as to Petitioner's Sanity Was Possible.

In Texas, as elsewhere, petitioner could not lawfully be tried if he were not mentally competent at the time of trial. He could not lawfully be convicted if he were insane at the time of the acts alleged. Insanity is recognized as a complete defense to a charge of crime. *Texas Penal Code*, Art. 34. Further, under the Texas law applicable to this petitioner, there is a continuing presumption of insanity since the 1924 judgment that he was insane has not been vacated. Though the 1957 Mental Code provides a different rule as to those who have been discharged from a mental institution, *Acts 1957*, 55th Leg., p. 505, c. 243, §83; *Texas Civil Statutes*, Art. 5547-81(b), this new rule has been held not applicable to a criminal defendant discharged from a mental hospital before the effective date of the 1957 statute. *Amos* v. *State*, 331 S.W.2d 225 (Tex. Cr. App. 1960). Indeed subsequent to the effective date of the new act the Texas Court of Criminal Appeals has held there is a continuing presumption of insanity with regard to this very petitioner, *Ex parte Bush*, 313 S.W.2d 287 (Tex. Cr. App. 1958), and the juries were charged, as was required, that petitioner was presumed insane (R. 7, 15-16).

To discharge its burden of proving beyond a reasonable doubt that petitioner was sane, despite the presumption to the contrary, the state relied, both at the insanity hearing and at the trial on the merits, on the testimony of three lay witnesses (R. 53-54; 66, 67-68; 124-125, 132-133) and of the county medical officer, Dr. John Compton (R. 57-65; 134-139). The testimony of lay witnesses requires no com-

ment. Though admissible in evidence, it is hardly sufficient to provide a basis for an informed judgment as to petitioner's sanity. Indeed this is well recognized in Texas, where it is stated in the Constitution that no person shall be committed to a mental hospital in a civil proceeding "except on competent medical or psychiatric testimony." *Texas Constitution*, Art. 1, §15a. If lay testimony is an insufficient basis for committing a person to a mental hospital for treatment, it is surely an insufficient basis on which to send a person to the penitentiary for life. The testimony of Dr. Compton, however, requires more detailed consideration.

This Court has referred to "the elusive and often deceptive symptoms of insanity." *Solesbee* v. *Balkcom*, 339 U.S. 9, 12 (1950). The Court thereby recognized what psychiatrists have long known. Years ago Dr. Isaac Ray spoke of "the delicate shades of disorder" in "that broad, debatable ground that lies between unquestionable sanity and unquestionable insanity." Ray, *Treatise on the Medical Jurisprudence of Insanity* §630 (5th ed. 1871). An English forensic psychiatrist of the nineteenth century of equal if not even greater stature than Ray, Dr. Henry Maudsley, wrote that "there can be no doubt that there do exist cases of insanity in which the intellectual derangement is scarcely, if at all, apparent; and, furthermore, that some of the most dangerous forms of the disease are of this kind—most dangerous, indeed because the insanity displays itself not in thought but in acts." Maudsley, *Responsibility in Mental Disease* 69 (Intl. Scientific Series ed. 1884). More recently Dr. Lowell S. Selling, who had much experience with these problems as director of the Psychopathic Clinic of the Detroit Recorder's Court, observed:

> The vast majority of mentally sick individuals who have committed serious offenses and who are brought

> to trial are close to the borderline. Their symptoms are such that the layman, and oftentimes even the psychiatrically inexperienced physician, cannot recognize their problem.

Selling, *Forensic Psychiatry*, 38 J. Crim. L. & Criminology 606, 611 (1949). The testimony of Dr. Compton must be examined to see if his experience, and his examination of petitioner, were sufficient to qualify him to detect the elusive and deceptive symptoms of insanity.

Dr. Compton is a general practitioner. He testified that his training included psychiatry, but that he had had no specialized training in that branch of medicine (R. 64). He testified also that in his own practice he treats patients with a mild emotional problem himself, but that he refers those with more difficult problems to a specialist (R. 136).

More than a century ago the pioneer American psychiatrist, Dr. Isaac Ray, expressed his view of the testimony of a person with Dr. Compton's limited background on such a difficult question as insanity:

> It is not enough that the standing of the medical witness is deservedly high in his profession, unless it is founded on extraordinary knowledge and skill relative to the particular disease, insanity. Lunatic asylums and retreats for the insane have so multiplied in our country, that patients of this class are almost entirely taken away from the management of the private physician and consigned to the more skilful conductors of these institutions; so that many a medical man may spend a life of full practice without having been intrusted with the care of a dozen insane persons. To such, therefore, a practical knowledge of the disease is out of the question, and thus the practical inducement is wanting to become acquainted with the labors of those

> who have enjoyed better opportunities. If a particular class of men only are thought capable of managing the treatment of the insane, it would seem to follow, as a matter of course, that such only are capable of giving opinions in judicial proceedings relative to insanity. True, in important cases the testimony of one or more of this class is generally given; but it may be contradicted by that of others utterly guiltless of any knowledge of the subject, on which they tender their opinions with arrogant confidence—for ignorance is always confident—and the jury is seldom a proper tribunal for distinguishing the true from the false and fixing on each its rightful value. An enlightened and conscientious jury, when required to decide in a case of doubtful insanity which is to determine the weal or woe of a fellow-being, fully alive to the delicacy and responsibility of their situation and of their own incompetence unaided by the counsels of others, will be satisfied with nothing less than the opinions of those who have possessed unusual opportunities for studying the character and conduct of the insane and have the qualities of mind necessary to enable them to profit by their observations. If they are obliged to decide on professional subjects, it would seem but just and the dictate of common sense that they should have the benefit of the best professional advice. This, however, they do not always have; and consequently the ends of justice are too often defeated by the high-sounding assumptions of ignorance and vanity.

Ray, *Treatise on the Medical Jurisprudence of Insanity* 28 (1st ed. 1838). What was true when Isaac Ray wrote is not less true today, as psychiatry has become a more complex science and the medical schools have failed to keep pace. Dr. Ray's words were echoed in our time by Dr. Winfred Overholser:

> If we review the historical evolution of expert testimony, it seems elementary to say that the courts should insist on qualifications. In general, they assume that any physician may testify on any topic in the field of medicine. In the field of psychiatry this is certainly unrealistic, in view of the wholly inadequate training in psychiatry which medical students, until very recently at least, have received, and the all-too-general lack of interest of the medical profession which still prevails in the matter of mental disorder.

Overholser, *The Psychiatrist and the Law* 128 (1953). For the reasons given by Dr. Ray and Dr. Overholser, psychiatrists are agreed that general practitioners, or specialists in other branches of medicine, are not qualified to give expert opinion, by either training or experience, on the mental status of prisoners. Strauss, *The Qualification of Psychiatrists as Experts in Legal Proceedings*, 2 L. & Contemp. Prob. 461, 463 (1935); Weihofen, *Mental Disorder as a Criminal Defense* 276-277 (1954); Williams & Elliott, *Court Procedure and Subsequent Treatment in Case of the Criminal Insane*, 35 J. Crim. L. & Criminology 233, 238 (1944). This is but a particular application of the general principle that the standards of the hospital and of the medical school must be brought into the courtroom, and that "the judge who takes the next train for Mayo Clinic or Menninger Foundation, in event of personal illness, should hold to the same scientific standards in admitting and evaluating medical opinion." Smith & Hubbard, *Doing Scientific Justice: Psychological Reactions to Traumatic Stimuli* (1962), U. Ill. L.F. 190, 206.

This has not been an easy lesson for the courts to learn. Typical of the older attitude is *Holland* v. *State*, 80 Tex. Cr. R. 637, 192 S. W. 1070 (1917). There the trial court refused to permit expert testimony as to sanity from a county

health officer, who said that he had read about insanity in connection with other diseases in his course of study, but that he had not given it special study and he did not hold himself out as an expert on insanity or mental conditions of the mind. The appellate court held that it was reversible error to refuse to permit expert testimony from a doctor who recognized his own limitations and claimed no expertness. Not a little of the same attitude was evidenced by the trial judge in the present case when he referred in a derogatory fashion to "so-called psychiatrists, alienists, quacks or specialists" (R. 38).

Though the lesson that the general practitioner is not qualified to give expert testimony as to sanity has not been an easy one, the courts have been learning it. "The suspicion that judges have of psychiatry and mental hospitals in general still exists, but decreases steadily in most areas of the country." Ewalt, Strecker & Ebaugh, *Practical Clinical Psychology* 98 (8th ed. 1957). This is demonstrated by cases holding that there should be a directed verdict of not guilty by reason of insanity where psychiatric testimony that defendant was insane has not been met with similarly weighty evidence to the contrary. E.g., *Wright* v. *United States*, 250 F.2d 4 (D.C. Cir. 1957); *Fielding* v. *United States*, 251 F.2d 878 (D.C. Cir. 1957). One commentator believes that the cited cases presage a requirement that the prosecution present psychiatric evidence whenever the defendant's responsibility for his actions is in issue. Note, 58 Col. L. Rev. 1253, 1261 (1958). The learning of this lesson is demonstratd by an Eighth Circuit decision holding that the appointment of a general practitioner to examine a federal prisoner, rather than a psychiatrist, as the statute, 18 U.S.C. §4244, requires, was so fundamental an error as to permit collateral attack under 28 U.S.C. §2255. *Krupnick* v. *United States*, 264 F.2d 213,

218 (8th Cir. 1959). It is demonstrated by the recent sharp division within the District of Columbia Circuit as to whether clinical psychologists, with training and experience in dealing with mentally ill persons far superior to that of Dr. Compton, are qualified to give expert testimony in the field of mental disorder. *Jenkins* v. *United States*, 307 F.2d 637 (D.C. Cir. 1962). See Hoch & Darley, *A Case in Court*, 17 American Psychologist 623 (1962). It is demonstrated by a South Carolina case where the trial court refused to commit defendant to the state hospital for examination by specialists, and instead named two reputable local physicians to make the examination. The South Carolina Supreme Court said that such an examination was "as might well have been apprehended, distinctly inadequate," and that the trial court's action was reversible error. *State* v. *Jones*, 201 S.C. 403, 408, 23 S.E.2d 387, 389 (1942). It is demonstrated by the recent observation of the late Judge Calvin Chesnut that "in the absence of specific obviously unusual events tending to indicate, even to a layman, unsound mentality, legal criminal responsibility for acts is necessarily a problem for expert psychiatrists." *United States* v. *McGann*, 202 F. Supp. 945, 949 (D.C. Md. 1962).

To require a jury to reach a judgment as to petitioner's sanity on the basis of the opinion of one with the limited training and experience of Dr. Compton would be, in Isaac Ray's words, to permit the ends of justice to be defeated "by the high-sounding assumptions of ignorance and vanity."

Even if Dr. Compton were qualified to diagnose mental responsibility, the examinations he made of petitioner were too cursory to permit such a diagnosis. The requisites of an adequate mental examination have often been stated. See, *e.g.*, Ewalt, Strecker & Ebaugh, *Practical Clinical Psychology* 75-98 (8th ed. 1957); Weihofen, *Mental Disorder*

as a Criminal Defense 335 (1954); *Williams* v. *United States*, 250 F.2d 19, 23 (D.C. Cir. 1957). A recent article by Dr. Winfred Overholser gives a fair summary of what proper psychiatric practice requires:

> There may be a very few cases in which a glance even by an untrained person will satisfy the observer that the subject is mentally deranged, but these cases are rare indeed. A proper examination calls first of all for a physical examination and if possible an electroencephalogram to determine from what are colloquially known as "brain waves" whether or not there is a tendency toward epilepsy or some other gross abnormality of the brain. The presence or absence of gross neurological changes should be tested. A reasonably full history of the individual is essential, together with various psychological tests; the history should be obtained from the subject himself and from outside sources. * * * The psychiatrist, whether examining an alleged offender or a private patient in his office, will take into consideration the entire body of symptoms and signs in an attempt to understand why the individual conducts himself and feels as he does. For this purpose several interviews or a period of observation in a mental hospital may be necessary.

Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 529 (1962).

Plainly this is not a short or an easy process. Even the most eminent specialist cannot be sure that a defendant is mentally responsible "on the basis of a peremptory examination of thirty or forty-five minutes' duration." Kreutzer, *Re-examination of the Briggs Law*, 39 Bos. U.L. Rev. 188, 198 (1959). A staff psychiatrist at St. Elizabeth's Hospital observes:

> For the purpose of demonstrating the presence of insanity, upon which a man's life may depend, psychiatric examinations of prisoners awaiting trial are altogether too brief. A one or two hour examination barely elicits the more immediate information. * * * Only a psychiatric examination which permits the reconstruction of the patient's entire life history, including emotional development, can enable a psychiatrist to report properly to the court. Such an examination would require at least twenty-five to thirty hours. It would be better yet if the defendant could be sent to a psychiatric hospital for detailed study.

Karpman, *On Reducing Tensions and Bridging Gaps between Psychiatry and the Law*, 48 J. Crim. L., C. & P.S. 164, 171 (1957).

Against this standard Dr. Compton's efforts can be assayed. He interviewed petitioner twice, once in his office shortly after petitioner was arrested and a second time in jail a few days before the trial (R. 57). These interviews were, as Dr. Compton testified, accurately described as "consultation" (R. 58). Dr. Compton "took the history from him" but the history was so incomplete that the doctor did not know of petitioner's criminal record (R. 58). He made no physical examination nor any physical tests (R. 58). He stated specifically that he did not use the Rorschach test (R. 136), and it appears from the record that he did not give any other kind of psychological tests. Instead his examination was limited to questioning petitioner, "as far as lunacy, as to his orientation" (R. 135). He asked petitioner such questions as his name, birthdate and age, who was President of the United States, and who was Governor of Texas, whether he had had any hallucinations, and put to him simple mathematical problems to see if he was able to keep a train of thought (R. 63). On the basis of this

limited questioning, Dr. Compton felt prepared to testify that petitioner was of sound mind.

There was evidence in the record that questions such as Dr. Compton put to petitioner form a proper part of a mental examination, but that such questioning "does not give an adequate indication of the person's mental state because we have all of these other things to consider" and that "a person may very well fool you on the basis of a verbal interview" (R. 71-72). Indeed even without such testimony it might well be judicially noticed that a person is not necessarily sane because he knows the name of the President of the United States—nor insane because he does not. A recent Royal Commission has commented on such a superficial tool for diagnosis:

> The fact that a person does not know the difference between a King and a President or can name only one of the oceans of the world, which we have seen quoted on several certificates, seems in itself quite irrelevant to the question whether that person is mentally defective to the extent that he is incapable of managing himself or his affairs or that he requires supervision or control for his own protection or for the protection of others (to quote the present legal definitions of imbeciles and feebleminded persons). To mention such things among the grounds for the diagnosis gives the impression that it in fact depends on whether the patient possesses odd knowledge of that sort. Any ordinary person tends to mistrust the whole diagnosis if facts of that sort appear to play an important part in it.

Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 276 (1957) (Cmnd. 169). That Dr. Compton was willing to give an opinion as

to petitioner's sanity on the basis of such a limited interview proves the truth of Isaac Ray's observation that "ignorance is always confident."

It is fair to conclude that the testimony offered in this case was not sufficient to permit a jury to form a meaningful judgment as to whether petitioner was sane.

II.

Commitment to a Mental Hospital or Examination by a Qualified Psychiatrist Are Widely Recognized as the Only Satisfactory Procedures for Determining Sanity.

Prior to trial in this case petitioner's counsel, fearful that petitioner would be denied the right to a fair trial because of his financial inability to provide himself with the necessary competent psychiatric testimony, moved alternatively that petitioner be sent to a mental institution for diagnosis and observation, or that the court appoint a competent independent psychiatrist to examine petitioner (R. 3-6). During the trial counsel again moved that the proceedings be suspended until petitioner could be sent to a mental institution for closer observation or in the alternative that the court appoint a psychiatrist or psychologist to examine petitioner (R. 136). These motions were not granted. Petitioner was thus denied what are widely recognized, by state legislatures and courts as well as by medical and legal writers, as the only satisfactory procedures to prepare for trial where sanity is seriously in issue.

In 23 states, as well as in the District of Columbia and in the federal courts, petitioner would have been granted the relief he sought. The statutes are summarized in Appendix A. They vary considerably in detail but the variations are not relevant in this case. Some apply only to repeated offenders, but petitioner amply satisfies that re-

quirement. Some provide for appointment of a psychiatrist to examine the accused, while others provide for commitment of the accused to a mental hospital for his examination, but either procedure would have met petitioner's need and he moved alternatively for each kind of help. In some states the psychiatrist is to report on the accused's ability to stand trial while in others the inquiry is as to his sanity at the time of the act in question, or at both times. Petitioner could not have been convicted if he were insane either when the coins were allegedly stolen or at the time of trial. Finally some of the statutes make such psychiatric examination mandatory while others give discretion to the trial court. Again the difference is unimportant for it would surely be an abuse of discretion to refuse such examination, where a statute makes it available, if the defendant has previously been adjudicated insane or hospitalized for mental illness. "* * * [N]o one can doubt that confinement in a mental institution upon an adjudication of mental illness is sufficient to generate in the minds of all of us a doubt sufficient to provoke inquiry." *Fitts* v. *United States*, 284 F.2d 108, 113 (10th Cir. 1960); *United States* v. *Walker*, 301 F.2d 211 (6th Cir. 1962).

Thus in 23 states, as in all federal courts, petitioner would have been examined by a psychiatrist. There is a second group of 10 states which provide for a pretrial examination where sanity is in issue, but do not specifically require that the examination be by a psychiatrist. Commonly these statutes speak of "disinterested qualified experts." These statutes are summarized in Appendix B. It is highly probable that the examination would be by a psychiatrist under these statutes, and indeed the authorities presented in Part I of this Brief demonstrate that a general practitioner could hardly be considered "qualified" for this purpose. However, since there is at least one decision under such a provision that psychiatrists are not

required, *State* v. *Reid*, 87 Ariz. 123, 348 P.2d 731 (1960), it is safer to treat this group of statutes separately, and to say only that petitioner would have been examined by a psychiatrist in 23 states and that the examination probably would have been by a psychiatrist in 10 other states.

It should be noted that in two other states the problem is recognized, but the provision for expert examination does not reach the circumstances of petitioner's case. Alabama provides for pretrial commitment for mental examination to the state hospital, but limits this to persons charged with a capital offense. *Ala. Code* (1940), tit. 15, §425. In Texas the Juvenile Court Act provides that the court may cause any person coming under its jurisdiction to be examined "by a physician, psychiatrist, or psychologist, appointed by the court". *Texas Civil Statutes*, Art. 2338-1, §16. Since petitioner was only to be sent to prison for life, and was neither a juvenile nor charged with a capital offense, he could not avail himself of statutes such as these, though the statutes show that the legislatures in question realize the desirability of truly qualified opinion.

In addition to the 33 states already mentioned in which petitioner either probably or certainly would have been granted the psychiatric examination he sought, it should be noted that in Alabama he could have subpoenaed a psychiatrist and compelled him to testify as to his opinion, without fee; *Ala. Code* (1940), tit. 7, §366, and that in Rhode Island the court has discretion to furnish criminal defendants with expert witnesses at the expense of the state. *R.I. Gen. Laws* (1956), §9-17-19.

Statutes of the sort here described have been enthusiastically hailed by courts and commentators. In *Jessner* v. *State*, 202 Wis. 184, 194, 231 N.W. 634, 638 (1930), the leading case upholding the constitutionality of such legislation, the Wisconsin court said:

> The function of these experts is to aid in the administration of justice, by furnishing reliable and unprejudiced opinions upon a technical subject. The whole purpose of their creation and appointment is to promote the accomplishment of the very purposes for which courts are established.

A year later, a California court said that the then new California statute providing for court appointment of experts to determine the mental condition of an accused "is in aid of truth, which the court is seeking in order to determine the controversy with justice to all." *People* v. *Strong*, 114 Cal. App. 522, 526, 300 Pac. 84, 85 (1931). The South Carolina court had this to say of its statute providing for commitment to the state hospital for examination whenever a question is raised as to mental disease of a criminal defendant:

> The foregoing statute, which has been in force a long number of years, represents quite a forward step in judicial procedure where there is any question as to the responsibility of an accused for a criminal act. It enables the court to secure technical evidence relating to his mental condition from an unprejudiced and reliable source and makes available to both the prosecution and defense expert evidence free from any possible sentiment of loyalty to either side. An examination under this statute is a distinct aid in the administration of justice.

State v. *Myers*, 220 S.C. 309, 311, 67 S.E.2d 506, 507 (1951). The Pennsylvania Supreme Court, speaking of the examination of the defendant by a psychiatrist and a psychologist from the Allegheny County Behavior Clinic, said:

> The modern tendency to utilize the services and testimony of specially trained professional people designated by the court itself, particularly in criminal trials where insanity is pleaded, is generally recognized as a progressive step which brightens the light of truth and reduces immeasurably the darkness of uncertainty.

Commonwealth v. *Butler*, 405 Pa. 36, 45, 173 A.2d 468, 473 (1961). The newest statute of this type was adopted in Mississippi in 1960. The court there joined in the chorus of praise, saying that the statute "was passed for a salutary purpose to avoid a defendant's ever being placed on trial for crime in this state unless he is at the time of trial capable of conducting a rational defense by intelligently conferring with his counsel as to the facts in connection with the crime." *McGinnis* v. *State*, 241 Miss. 883, 133 So.2d 399, 401 (1961).

In addition to the 33 states which have statutes which would reach petitioner's case, psychiatric court clinics exist to assist the court by making such examination available in many cities, including some, such as Chicago, where there is no state statute authorizing pretrial psychiatric examination. Note, *Psychiatric Court Clinics*, 29 Temp. L.Q. 347 (1956). The practice here urged as desirable is widely followed in other civilized countries. In Canada, despite some difficult problems of statutory construction, it is apparently the practice to commit defendants of questionable sanity to a mental hospital for 30 days for examination. Menzies, *Procedure Under Criminal Code Respecting Insane or Mentally Ill Prisoners*, 1 Crim. L.Q. 335 (1959). In England the Poor Prisoners Defence Act, 1930, 20 & 21 Geo. V, c. 32, as amended by the Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51, puts on the government the burden of the expenses of the defense of an indigent accused, but there are also limited commitment provisions

in the Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, §§ 72, 73. See Williams, *The Mental Health Act, 1959*, 23 Modern L. Rev. 410, 412 (1960). Chief Judge John Biggs, Jr., has surveyed the practices in Europe. Biggs, *Procedures for Handling the Mentally-Ill Offender in Some European Countries*, 29 Temp. L.Q. 254 (1956). It appears from Judge Biggs' study that in Sweden there is a compulsory psychiatric examination of criminal defendants whenever the defendant has previously suffered from mental disease or is to be detained as a recidivist or there is any other reason to suspect the existence of mental disorder. Denmark follows a similar policy; the mental examination is as thorough as the situation requires, and may cover as long as six months. In Norway whenever a question of sanity is raised two psychiatrists with forensic experience are selected from an approved panel to make an examination, which includes a complete case history and use of the electro-encephalograph and the Rorschach and other tests. In Belgium a scientific examination by a psychiatrist is always made in serious criminal cases. In Italy and in Switzerland if there is any doubt as to defendant's responsibility a mental examination may be ordered at any stage of the proceedings. An examination lasting usually about six weeks is made by psychiatrists in the Netherlands whenever considered advisable. Court-appointed psychiatrists examine the accused in Germany whenever the reasons given either by the state or the defendant justify such a procedure. Judge Biggs concludes, at 263:

> It is apparent from a review of European legal systems that many countries are making use of scientific and humane procedures for handling the mentally-ill criminal; that this is being done without abnegation of the criminal law or chaos resulting therefrom and with no intention of changing these procedures for harsher

> and antiquated measures. In other words, although recognizing the handicaps of a shortage of forensic psychiatrists, insufficient equipment, and lagging public opinion, the authorities are of the view that these procedures are fundamentally sound and effective. * * * It is particularly important for us in America to consider what is being done in other forward-looking countries, with the thought of employing their knowledge and experience in improving laws and attitudes in the United States.

Statutory provision for mental examination of a criminal defendant, either by commitment to a state hospital for this purpose or the appointment of psychiatrists by the court, has frequently been recommended by respected professional groups. Perhaps the earliest such recommendation was made in 1915 by the American Institute of Criminal Law and Criminology, on the advice of its Committee on Insanity and Criminal Responsibility. After three years' study of the problem, this very distinguished committee, under the chairmanship of Professor Edwin R. Keedy, and including four eminent psychiatrists, a judge, and a law school dean, proposed a bill giving courts authority to summon one or more distinterested qualified experts, or to commit the accused to the state hospital for observation, whenever the existence of mental disease or derangement becomes an issue in the trial of a case. Keedy, *A Bill to Regulate Expert Testimony*, 5 J. Amer. Inst. Crim. Law 643 (1915). Dean Wigmore, noting the distinction of the committee which made this proposal, said that "our profession can afford to give full faith and credit to the proposal of such a body," and observed of the recommendations the committee had made:

> They are measures which the medical profession has long demanded. The perverse thing about our law

> has been that it flew in the face of facts. It has complacently expected to get at the truth without methods which are always used in getting at the truth in ordinary scientific practice.

Wigmore, *The Bill to Regulate Expert Testimony*, 9 Ill. L. Rev. 353, 354-355 (1914).

A proposal in similar vein was made by Dr. Vernon L. Briggs in 1921. Briggs, *The Manner of Man That Kills* 16-18 (1921), and led to enactment in Massachusetts that year of the much-admired Briggs Law, *Mass. Laws* (Supp. 1961), c. 123, §100A. Experience under that statute was extremely successful. Glueck, *Psychiatric Examination of Persons Accused of Crime*, 36 Yale L.J. 632 (1927); Kreutzer, *Re-examination of the Briggs Law*, 39 Bos. U.L. Rev. 188 (1959). This experience heightened the interest of other professional groups in such reform.

In 1928 the American Psychiatric Association, again on the advice of an able committee under the chairmanship of Dr. Karl A. Menninger, called for adoption of "legislation such as the recent Massachusetts enactment and the expert testimony bill of the American Institute for Criminal Law which put the psychiatrist in a position of counselling the legal authorities as to the disposal of social offenders, implying the development of the necessary machinery (clinics, court psychiatrists, etc.)." The Association further endorsed: "The court appointment from a qualified list, of the psychiatrists testifying in regard to mental status, mechanisms or capabilities of a prisoner, with opportunity for thorough psychiatric examination using such aids as psychiatrists customarily use in practice, clinics, hospitals, etc., with obligatory written reports and remuneration from public funds." Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 J. Crim. L. & Criminology 367, 376 (1928). Similar provisions were endorsed

by the American Law Institute in 1930. A.L.I., *Code of Criminal Procedure* §308 (1930).

A committee of the Judicial Conference of Senior Circuit Judges, under the chairmanship of Judge Calvert Magruder, referred in its 1944 report to the need for "the advice of trained psychiatrists * * * in the detection of mental disorders which may not be readily apparent to the eye of the layman." *Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime*, Sept. 1944, p. 5. This committee's study led to the approval by the Judicial Conference in 1946, *Report of the Judicial Conference of Senior Circuit Judges* 18 (1946), and adoption by Congress in 1949, of legislation providing for psychiatric examination of federal prisoners. *Act of Sept. 7, 1949*, c. 535, §1, 63 Stat. 686, 18 U.S.C. §§4244-4248.

A comprehensive study of this problem was made in 1954 for the Group for the Advancement of Psychiatry by its Committee on Psychiatry and Law. That group declared that "in the interest of a comprehensive criminal justice, psychiatric expert testimony is indispensable," and said:

> Hurried examinations and observation of offenders in prison cells, commonly without privacy, in some instances in the presence of an attorney, are conducive neither to good psychiatry nor as a career incentive to the well-trained psychiatrist.
>
> The Committee submits that good court psychiatry requires no less than the minimum standards of civil practice. Minimum standards are as follows: a. Observation of the offender in a facility under psychiatric examination. b. A minimum-maximum term of observation to be determined by mutual agreement between the Courts and the psychiatric facility. c. Provision of

> facilities for psychologic testing. d. Provision for social service case work. e. Provision for laboratory adjuncts, including electro-encephalography. f. Provision for consulting services of medical specialists. g. Organization of such services to operate in accordance with established standards of practice, diagnosis, supervision, and reporting; to provide for interval evaluations and to promote teaching and social science research.

This Committee, like every other similar group, concluded by recommending a bill which would permit a court to designate psychiatrists to examine accused persons and testify as to their mental condition. The Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, *Criminal Responsibility and Psychiatric Expert Testimony*, Report No. 26, May 1954, pp. 6-8.

The American Bar Foundation concluded in 1961 a study of the problems of the mentally disabled and the law. Its recommendation on this particular problem was:

> Any accused raising the defense of irresponsibility should undergo a thorough mental examination by a panel of impartial experts. This type of examination performs a dual function. First, it removes the label "rich man's defense" from the insanity plea by providing expensive psychiatric testimony to the accused, who otherwise may lack the necessary funds. Second, it would tend to eliminate the "battle of the experts" by offering to the jury a neutral body of psychiatric testimony.

Lindman & McIntyre, *The Mentally Disabled and the Law* 366 (1961).

Finally in 1962 the American Law Institute gave final approval to its Model Penal Code. Section 4.05 of that Code,

in line with all modern thinking, provides that whenever a defendant raises the defense of mental disease or defect excluding responsibility, or there is other reason to doubt the defendant's fitness to proceed or to believe that his mental condition will become an issue in the case, the court shall appoint at least one qualified psychiatrist to examine the defendant, and may order him committed to a hospital or other suitable facility for such examination. A.L.I., *Model Penal Code* §4.05 (Proposed Official Draft, 1962). For commentary on this proposal, see A.L.I., *Model Penal Code* 195 (Tent. Dr. No. 4, 1955).

As the professional groups have been aware, experience under statutes such as they propose has demonstrated the unsoundness of fears that psychiatrists, if given a free hand, would find practically all accused persons insane. In the first 14 years of the Briggs Law in Massachusetts, only 13.8% of all defendants examined were reported to be either definitely abnormal mentally or in such condition that observation in a mental hospital was deemed advisable. Overholser, *Psychiatry and the Law*, Encyclopedia of Criminology 394, 396 (Branham & Kutash eds. 1949). Comparable results have been reported in Colorado. Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 L. & Contemp. Prob. 419 (1935).

A procedural provision enthusiastically supported for nearly a half century by such groups as the American Institute of Criminal Law and Criminology, the American Psychiatric Association, the Judicial Conference of Senior Circuit Judges, the Group for the Advancement of Psychiatry, the American Bar Foundation, and the American Law Institute, may well be thought "indispensable," as one of those groups said, to the fair administration of justice. "* * * [A] pre-trial mental examination of an

accused of doubtful competency is absolutely essential if we are to avoid trying the incompetent * * *." Note, 51 Geo. L.J. 143 (1962). Distinguished legal writers, from Wigmore to the present, have agreed with the professional groups as to how such an examination should be made available. They urge the discard of "outmoded, inefficient and unfair procedures." Mueller, *Procedure to Determine Responsibility and Fitness to Proceed in Criminal Cases*, 3 Crim. L. Rev. 29, 44 (1956), and the adoption of procedures such as those already in effect in more than half of the states. See, *e.g.*, Weihofen, *Eliminating the Battle of Experts of Criminal Insanity Cases*, 48 Mich. L. Rev. 961, 974 (1950); Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders*, 43 J. Crim. L., C. & P.S. 312 (1952); Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061 (1962); Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* 74 (1962); Comment, *Professor George H. Dession's Final Draft of the Code of Correction for Puerto Rico*, 71 Yale L.J. 1050, 1136 (1962). A member of this Court has well summarized the unanimous view of modern authority on this question:

> The experience in Massachusetts and in California, shows, I think, that the successful cooperation of law and psychiatry in the field of criminal law is greatly enhanced once the experts are selected by strict professional standards, once they are neutral and impartial, and once the law is administered in an even-handed way, bringing the psychiatrist into the run of cases, not solely into those cases that are hand-picked by the judges or the lawyers.

Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 Iowa L. Rev. 485, 493-494 (1956).

The combined judgment of the legislatures of more than half of the states, the Congress of the United States, many foreign countries, the most distinguished legal and psychiatric professional associations, and eminent legal scholars, is that a case in which insanity is a defense cannot be fairly tried unless the state makes provision for psychiatric examination of the defendant.

III.

The Fourteenth Amendment Requires the States to Provide an Indigent Defendant With Psychiatric Examination Where Sanity Is Seriously in Issue.

When the American Law Institute was discussing the provisions of the Model Penal Code dealing with mental illness as a defense, the Reporter, Professor Herbert Wechsler, described §4.05 of the Code, providing for psychiatric examination of accused persons, as "the heart of this matter." *A.L.I. Proceedings* 225 (May 21, 1955). There is much professional ferment at the present time as to the proper test for criminal responsibility. The M'Naghten rules, the Durham test, the Currens test, and the A.L.I. test all claim staunch adherents. The test which the jury is to apply makes no difference if the jury does not have the information to make a sensible application of any test. Professor Sheldon Glueck has spoken recently of "the vital significance of adequate *procedural* provisions in the administration of the tests." Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* 74 (1962). He says further:

> Were the jury allowed to project the knowledge and irresistible impulse tests against the background of unhampered psychiatric reports on the accused's condition and history—made as is done by a trained and experienced practitioner of mental medicine when he

> observes and examines the patient thoroughly, applies the necessary medical, psychological, chemical and biological tests, and takes a reliable history of hereditary and developmental involvements—then the jury might more effectively and fairly apply *whatever* yardstick of irresponsibility the jurisdiction has put its faith in.

Id. at 61-62.

The Constitution of the United States requires no less. It requires that provision be made to give the jury, in cases where sanity is seriously in issue, the information which is necessary to the formation of a meaningful resolution of that issue.

> A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment.

United States ex rel. Smith v. *Baldi*, 344 U.S. 561, 571 (1953). Though the quoted remark was uttered in dissent, it is believed that the majority in *Smith* would agree with the principle stated. A year later the Court was unanimous in *Massey* v. *Moore*, 348 U.S. 105 (1954), in holding that the Constitution requires an adequate hearing on a question of insanity. See also *Snider* v. *Smyth*, 263 F.2d 372 (4th Cir. 1959), where on habeas corpus the Fourth Circuit remanded a case with directions to arrange for a mental examination, preferably with the cooperation of the Commonwealth of Virginia in a state hospital, even though the defendant's attorneys had never properly raised the issue of sanity in any proceedings. Only recently the judges of that court have read *Smith* v. *Baldi* as authority for the proposition that "there is little doubt that the state must provide an adequate means by which an accused can

raise the issue of insanity," and that the state must provide "cautious investigation" of a defendant's mental condition before trial. *Pannell* v. *Cunningham*, 302 F.2d 633, 634, 635 (4th Cir. 1962).

The present petitioner did not have an adequate opportunity to sustain the plea of insanity. Though he has once been judged to be insane, and is presumed by Texas law still insane, he was found sane by the jury after a trial in which there was no qualified evidence as to his mental condition. He was denied the procedural protections which are regarded by all experts who have studied the subject, and by the lawmakers in a majority of the states, as necessary to a fair determination of whether he can be held criminally responsible. A proceeding which finds a man sane, and results in a life sentence to the penitentiary, in the absence of any expert evidence as to his sanity, is so lacking in fundamental fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment.

The Texas Court of Criminal Appeals believed that to grant petitioner the constitutional right which he claimed there, as here, would be "to extend" the holding of *Smith* v. *Baldi* (R. 160). It relied on a single sentence in the *Smith* case, taken out of context, in which this Court said: "We cannot say that the State has that duty by constitutional mandate." 344 U.S. at 568. Quotation of the full paragraph of the *Smith* opinion, from which the Court of Criminal Appeals extracted but a sentence, illustrates that the holding there is not contrary to the present petitioner's contention, and indeed that the language of the Court supports what is here sought:

> This brings us to petitioner's second point: That the assistance of a psychiatrist was necessary to afford him adequate counsel. The record of the trial-court

> proceedings reveals that on November 5, 1948, a psychiatrist, who had examined petitioner at the court's request, testified as to petitioner's sanity at the time of the trial and at the time of the commission of the crime. In addition, on October 28, 1948, two other psychiatrists were called by the defense to testify as to petitioner's mental competence. On the same day petitioner's counsel also introduced various reports and letters dealing with his client's mental history. On this evidence the court determined his sanity. Petitioner further asserts that he should have been given technical pretrial assistance by the State. Although the trial judge testified that defense counsel made no such request, petitioner here states that the trial court refused to appoint a psychiatrist to make a pretrial examination. We cannot say that the State has that duty by constitutional mandate. See McGarty v. O'Brien, 1 Cir., 188 F.2d 151, 155. As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices.

344 U.S. at 568. The very evidence which the Court held "suffices" in the *Smith* case was denied to petitioner in the instant case. He was found to be sane, contrary to the prior adjudication of insanity, solely on the basis of the opinions of lay witnesses and of a doctor with no specialized training in mental ills. Psychiatrists testified in Smith's case. They did not in Bush's case, despite his repeated requests for such testimony.

This reading of the *Smith* case is strengthened by the Court's reliance there on the decision of the First Circuit in *McGarty* v. *O'Brien*, 188 F.2d 151 (1st Cir. 1951). The petitioner for habeas corpus in that case had been convicted of a crime in Massachusetts. Prior to trial he had been examined by two psychiatrists designated by the State

Department of Mental Health, pursuant to the Briggs Law of that state. *Mass. Laws* (Supp. 1961), c. 123, §100A. At page 155, the page cited by this Court in referring to the *McGarty* case, the First Circuit said:

> "This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility. Quite the contrary, in compliance with a mandatory provision of law, the state has, at public expense, provided such examination by two impartial experts; and their joint report has been made available to the defense. The doctors designated by the Department of Mental Health to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely because he is, as here, compensated by the state.

The holding in *McGarty* is that where the state has provided a psychiatric examination, and there is no challenge of the professional standing and competence of the psychiatrists, nor of their complete impartiality or the thoroughness of their examination, 188 F.2d at 157, the state has met the requirements of the Fourteenth Amendment. Texas provided the present petitioner with no such benefits.

The *Smith* and *McGarty* cases suggest, as a minimum compulsion of due process under the Fourteenth Amendment, that in a case where insanity is seriously in issue, the state must make available testimony by competent psychiatrists who are completely impartial and who have made a thorough examination. Such a requirement is not unduly burdensome on the state, as is evident from the fact that more than half of the states have chosen voluntarily to provide due process for persons in petitioner's

situation by authorizing psychiatric examination. No particular procedural provision is needed. "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for their performance of their duties. * * * This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." *In re Peterson*, 253 U.S. 300, 312 (1920); Comment, *The Trial Judge's Use of His Power to Call Witnesses—An Aid to Adversary Presentation*, 51 Nw. U.L. Rev. 761 (1957). Even before passage of the 1949 statute authorizing psychiatric examination of defendants in federal court, it was usual practice in the district courts to order, with the defendant's consent, commitment for such an examination. *United States* v. *Harriman*, 4 F. Supp. 186 (S.D.N.Y. 1933); *cf. State* v. *Mulrine*, 183 A.2d 831 (Del. Super. 1962). Under a statute which authorized mental examination as to the accused's capacity to assist in his own defense, a federal court has been held to have power to order examination also as to the accused's mental state at the time of the crime, where the accused is without the financial and intellectual resources to obtain the evidence on his own. *Winn* v. *United States*, 270 F.2d 326 (D.C. Cir. 1959). Nor is it relevant that "the Court had no fund or money for so-called psychiatrists, alienists, quacks or specialists" (R. 38). It is "a principle of medical ethics that the indigent always have a call on a doctor for his free services." Davidson, *Forensic Psychiatry* 246 (1952). Surely this principle would apply also where a court seeks the aid of a psychiatrist so that it may do justice to an indigent. In the early days of the Briggs Law in Massachusetts public-spirited practitioners performed the examinations without any compensation at all. They are now paid $7 for each examination, but as a commentator says,

with dry understatement, "this amount is so out of line with present day charges in private practice that it cannot be a significant factor in securing the services of competent psychiatrists." Kreutzer, *Re-examination of the Briggs Law*, 39 Bos. U.L. Rev. 188, 197 (1959). Despite the public image which Texans sometimes give, it cannot be doubted that in Texas, as in Massachusetts, there are public-spirited psychiatrists who would serve without fee at the request of a court until such time as the Texas legislature follows the lead of 35 other states and makes provision for a fee in such situations.

The state must give those protections required by the Fourteenth Amendment, no matter what difficulties it may cause for the state, but that it will create no serious difficulties is relevant to a determination that a particular protection is in fact required by the Fourteenth Amendment. See *Mapp* v. *Ohio*, 367 U.S. 643, 659-660 (1961).

There is a further reason why the trial in the present case resulted in a denial of liberty without due process of law. Since *Powell* v. *Alabama*, 287 U.S. 45 (1932), it has been settled that there are some cases in which the right to court-appointed counsel is protected by the Fourteenth Amendment. Whatever may be the fate of the limitation on that rule first announced in *Betts* v. *Brady*, 316 U.S. 455 (1942), there is no doubt that the present case is within the *Powell* principle. Texas commendably recognizes, *Ex parte Bush*, 313 S.W.2d 287 (Tex. Cr. App. 1958), as indeed it must, *Massey* v. *Moore*, 348 U.S. 105 (1954), that the Fourteenth Amendment requires a state court to appoint counsel for a criminal defendant, even in a noncapital case, who is presumptively insane. In this case counsel was so appointed. But the right to counsel is meaningless if the lawyer is unable to make an effective defense because

he has no funds to provide the specialized testimony which the case requires.

> To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense.

Ex parte Ochse, 38 Cal. 2d 230, 238 P.2d 561 (1951). In the *Ochse* case the issue was whether prison regulations could prevent examination of a defendant by a psychiatrist he had hired, but the California court's point about the necessity of such assistance to make the right to counsel effective is as valid where it is poverty that prevents psychiatric examination as where it is a prison regulation which creates the bar.

If there are grave indicia of mental disease, and it appears that counsel cannot prepare his client's case properly without the aid of a psychiatrist, one must be appointed by the court if due process is to be had. To require the appointment of counsel for an indigent accused is to require the appointment of counsel learned in the law, a member of the bar. The requirement of due process, as set out in *Powell* v. *Alabama*, would not be met by the appointment of a layman as counsel. The appointment of counsel for a deaf mute would not constitute due process of law unless an interpreter also was available. Nor does the appointment of counsel learned in the law fulfill the requirement of due process if that counsel requires the assistance of a psychiatrist in order to prepare an insane client's defense. A modern and realistic approach to the problem of the insane defendant requires psychiatric assistance for his counsel at least under some circumstances. Concepts of due process change and as civilization progresses our ideas of fundamental fairness necessarily enlarge themselves.

The preceding paragraph is based on the opinion of Chief Judge Biggs for himself and two others, in *United States ex rel. Smith* v. *Baldi*, 192 F.2d 540, 559-560 (3d Cir. 1951). Since Judge Biggs was writing in dissent, and this Court affirmed the holding of the majority in that case, his observations cannot be regarded as "authoritative." It is difficult, however, to think of any persuasive answer to the argument he advances. The difficulty is illustrated by the decision of the Arizona Supreme Court in *State* v. *Crose*, 88 Ariz. 389, 392, 357 P.2d 136, 138 (1960):

> We have no doubt that court appointed counsel in cases such as this often face grave difficulties in matching, on behalf of their clients, the resources available to the prosecution. It is also certainly true, as a practical matter, that the assistance of experts in advance of trial often lies at the very heart of a successful defense. Nevertheless the constitutional right to counsel has never been construed to include such assistance.

In the *Crose* case there was psychiatric testimony as to defendant's sanity, and his claim was that the court should have appointed experts specifically for the defense. There may be merit in such a claim. See Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061, 1071-1076 (1962). We do not make such a claim in the present case. We insist only that some psychiatric evaluation of the defendant's condition should have been made available to the court and to counsel. Whether the *Crose* case was decided correctly or not on its particular facts need not concern us in the present case, but the Arizona court's assertion that due process does not call for that which it concedes "often lies at the very heart of a successful defense" demonstrates the strength of Judge Biggs' argument that, in cases of this

sort, the appointment of counsel is meaningless without the provision of some form of psychiatric assistance.

We suggested earlier that the *Smith* and *McGarty* cases define a minimum compulsion of due process. The *Smith* case is not, however, the last decision from this Court relevant to the present case. In the year *Smith* was decided, the late Judge Jerome N. Frank observed that "a man may be jailed for life, or even electrocuted, because he hasn't the money to discover a missing document necessary to win his case or to employ a competent hand writing expert or psychiatrist." Such a situation, in Judge Frank's view, "makes a farce of 'equality before the law.'" Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93, 101 (1953). A similar view had been expressed about the same time by two experts on the relation of psychiatry and law:

> The wealthy litigant can summon experts of a caliber his poor opponent cannot afford. In criminal cases only the defendant with money can afford to purchase expert evidence equal to that which the prosecution, with all the resources of the state behind it, can obtain. The spectacle of a wealthy defendant presenting the insanity defense bolstered by the testimony of high priced experts produces a not unnatural cynicism regarding the reality of our ideal of "equal justice under law."

Guttmacher & Weihofen, *Psychiatry and the Law* 252 (1952). Similarly the American Bar Foundation recommends psychiatric examination at public expense because such a plan "removes the label 'rich man's defense' from the insanity plea . . . ." Lindman & McIntyre, *The Mentally Disabled and the Law* 366 (1961).

This Court took a long step toward ending the "farce" of which Judge Frank spoke by its decision in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Patently the problem in *Griffin* was quite different from that in the present case, but the rationale of the *Griffin* holding is concisely stated at 19:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

To hold that the present petitioner can be found sane, despite the prior adjudication to the contrary, and can be sent to jail for life after a trial devoid of psychiatric testimony, though such testimony would surely have been heard were the defendant a man of means, would be to make the kind of trial a man gets dependent on the amount of money he has, and would be a denial of the equal protection of the laws.

There is a discernible movement in the courts away from such a squalid discrimination against the impoverished defendant. It is held that the government will provide handwriting experts for the defense. *Bandy* v. *United States*, 296 F.2d 882, 888 (8th Cir. 1961); *United States* v. *Fox*, 19 F. Supp. 463 (S.D.N.Y. 1937). The claim that there is a constitutional right to the appointment of an accountant to assist an indigent indicted for income tax evasion was rejected by the Seventh Circuit only on the ground that the trial court's dismissal of the case, for want of such assistance, was premature. *United States* v. *Brodson*, 241 F.2d 107 (7th Cir. 1957). Dissenting from even that limited holding, Judge Finnegan put vividly the contention which petitioner is advancing in this case:

> If society merely wants automatic convictions then a hamstrung defense will facilitate achievement of that shabby aim, but if society desires that courts engage

> in a search for truth, before punishing, then I would avoid being stingy with defense materials.

Id. at 115.

The need for assistance to the defense of indigents is especially pressing where sanity is in issue. The court-appointed attorney, working for at best a very modest fee, can, by his own devoted effort, accomplish much which in other cases would require a substantial financial outlay. He can hunt for witnesses himself if there are no funds for investigators. He can acquire a sufficient familiarity with the principles of accounting to make an understandable presentation of the defense. But the lawyer cannot make himself into a psychiatrist,* nor provide without help the psychiatric testimony which an issue of sanity requires.

> The preparation of the psychiatric evidence which is required to prove an individual's mental condition at some past date is a very difficult task. It is a task for which the accused generally lacks both financial and intellectual capacity. * * *
>
> Indigent defendants of questionable mental capacity are obviously in no position to conduct these inquiries and whatever others may prove necessary. Their court-appointed attorneys are given no funds for the purpose. If the relevant facts are to be presented to the court, therefore, it must ordinarily be as a result of inquiries instituted by the Government.

---

* The lawyer who attempts to do so is likely to share the frustration expressed by Sir James Fitzjames Stephen: "I have read a variety of medical works on madness, but I have found the greatest difficulty in discovering in any of them the information of which I stood in need; namely, a definite account of the course of symptoms collectively constituting the disease." 2 Stephen, *History of the Criminal Law of England* 131 (1883).

Williams v. *United States*, 250 F.2d 19, 23-24 (D.C. Cir. 1957).

In the United States, Judge Frank tells us, "We must face a shocking fact: a man may be convicted when his only crime is that of being poor." Frank & Frank, *Not Guilty* 86 (1957). To the extent that this is true, it is a denial of the great guaranty of equal protection of the laws. The Equal Protection Clause and the Due Process Clause, singly and together, require that where sanity is seriously in issue, the state make available to an indigent defendant the kind of psychiatric examination and testimony which is universally recognized as providing the only sound basis for an adequate determination of the defendant's responsibility.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the case remanded for a new trial after adequate psychiatric examination of petitioner.

Respectfully submitted,

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December 19, 1962

APPENDIX A

Statutes Providing for Examination by a Psychiatrist

Arkansas Statutes (Supp. 1961) 43-1301: Whenever the defense of insanity has been raised in a criminal case or the judge is of opinion that there are reasonable grounds to believe that the defendant was insane at the time of the alleged offense or has since become insane, "the judge shall postpone all other proceedings in the case and shall forthwith commit the defendant to the Arkansas State Hospital for nervous diseases, where the defendant shall remain under observation for such time as the court shall direct, not exceeding one month. The judge shall order the superintendent or supervising officer of the state hospital to direct some competent physician or physicians employed by the state hospital to conduct observations and investigations of the mental condition of the defendant, and to prepare a written report thereof. * * *."

California Penal Code 1027: "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. * * *"

Colorado Revised Statutes (Supp. 1961) 39-8-2(1): "Upon the making of such plea of insanity, the judge shall forthwith commit the defendant to the Colorado psychopathic hospital at Denver or to the state hospital at Pueblo, or to such other institution as may be designated hereafter by law, where he shall remain under observation

and examination, by physicians who are specialists in mental diseases, for such time as the court may direct, not exceeding one month, or the judge, in lieu of such commitment, may forthwith appoint a commission of one to three physicians who are specialists in mental diseases, resident or having offices in, or not more than thirty miles distant from the town or city in which the case is pending, to examine the defendant at the jail in which he is confined or at such other place as may be designated by the judge, such examination to be completed within one month after such appointment."

Delaware Code (1953), tit. 16, §5142(c): the state mental hygiene clinic "may likewise observe, examine, study, and treat any person charged with any offense in, or subject to the jurisdiction of, any court within the State, when requested to do so by a judge or judges thereof."

Hawaii Revised Laws (1955) §258-36: "Whenever a person has been indicted for a felony by a grand jury, the judge of the court in which such person is to be tried for such offense may, in his discretion, before any trial on the criminal charge, cause such person to be examined by the psychiatrist or any designated psychiatrist of the territorial hospital or the director of the bureau of mental hygiene and by two additional unbiased physicians who in the opinion of the judge are qualified as examiners in insanity, with a view to determine the mental condition of such person and the existence of any mental disease or defect which would affect his criminal responsibility. In every such case such person shall by the order of the court be placed in detention in the territorial hospital or elsewhere as the court may direct for the purpose of such examination for a period of ten days or until completion of such examination if not concluded within the ten days, and the persons so making the examination shall file with the court their written report and opinions thereon, which report shall be accessible to the court, the prosecuting attorney and the attorney for the accused. * * * "

Kentucky Revised Statutes (1960) §203.340(1): "When a person who has been twice previously convicted of a felony, is indicted by a grand jury as an habitual criminal, the

circuit clerk of the court in which he is indicted shall give notice of the indictment to the Commissioner of Mental Health within seven days after the indictment is returned by the grand jury. The commissioner shall cause such person to be examined by a psychiatrist already in the employ of the department, to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. * * * *"

Maine Revised Statutes (1954) c. 27, §118: On a plea of insanity, any justice of the court before which defendant is to be tried "may, in vacation or term time, order such person into the care of the superintendent of either insane hospital, to be detained and observed by him until further order of court or any justice thereof, that the truth or falsity of the plea may be ascertained. * * *"

Maryland Code (1957), Art. 59, §7: "* * * The judge of the court, in which such indictment or information is pending, shall have full power and authority at any time, before trial, to order an examination of the mental condition of such person by the Department of Mental Hygiene * * *."

Massachusetts Laws (Supp. 1961) c. 123, §100A: "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court, as the case may be, shall give notice to the department, which shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. * * *"

Mississippi Code (Supp. 1960) §2575.5: "In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court * * * may order such person to submit to a mental examination by a competent psychiatrist selected by the court to determine his ability to make a defense; provided, however,

any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending."

New Hampshire Revised Statutes (1955) §135:17: Whenever the justice is notified by either party that there is a question as to the sanity of a criminal defendant, the justice "may, in term time or vacation, order such person into the care and custody of the superintendent of the state hospital, to be detained and observed by him until further order of the court, or until such person shall have been ordered discharged from the hospital by its trustees upon a report to them by the superintendent that such person is not insane."

New York Code of Criminal Procedure §658: "* * * [I]f the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity." [It is provided in §659 that the examination is to be made by "two qualified psychiatrists."]

North Carolina General Statutes (Supp. 1961) §122-91: "Any alleged criminal indicted or charged with the commission of a felony may, on the order of the presiding or resident judge of the superior court, in or out of term, be committed to a State hospital for a period of not exceeding sixty days for observation and treatment. * * * ".

North Dakota Code (1960) §29-20-01: Whenever the court has reasonable ground to believe that a defendant "is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court immediately shall fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing, or it may commit the defendant to the state hospital for the insane for observation and examination regarding his present mental condition. * * * " [There is a similar provision in §29-20-03 where sanity at the time of the offense is in issue.]

Ohio Revised Code (1953) §2945.40: "In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by a court or jury, the court may commit the defendant to a local hospital for the mentally ill, or the Lima state hospital, where the defendant shall remain under observation for such time as the court directs not exceeding one month. The court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing. * * * "

Oklahoma Statutes (Supp. 1962) tit. 43A, §60: "If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and the question arises as to his sanity or state of mental health, such individual may be ordered by a court of record having jurisdiction of the criminal proceedings into a State hospital within the Department for observation for a period not to exceed ninety (90) days."

Pennsylvania Statutes (1954) tit. 50, §1222: "Whenever any person charged with crime, upon production or appearance before the court, appears to be mentally ill or in need of care in a mental hospital, the court shall designate a responsible person to apply for his commitment, or for his commitment for observation, treatment and diagnosis, by order of such court, in accordance with the provisions of this act for the commitment of persons who are not convicted of crime or who have not been charged with crime." [§1225 states that the "psychiatric examination" is to be made by "two qualified physicians or a commission."]

South Carolina Code (Supp. 1960) §32-927: "Any judge of the circuit court, county court or juvenile-domestic relations court may order admitted to the State Hospital any person charged with the commission of any criminal offense who shall, upon the trial before him, be adjudged mentally ill or in whom there is a question as to the relation of mental illness to the alleged crime, whether this

question is raised by the prosecution or defense or appears to the judge from any evidence brought before him or upon his own recognition. * * * "

Tennessee Code (Supp. 1961) §33-513(5): When a defendant "is suspected of being mentally ill, the judges having criminal jurisdiction thereof shall have authority * * * after hearing, to commit said person to any mental institution in his district having facilities therefor, for observation, treatment, and hospital care for a period not exceeding thirty (30) days, and the cost of maintaining said prisoner in said institution shall be added to the costs of court in said cause."

Utah Code (1953) §77-24-17: "When a defendant gives notice of the defense of insanity, the court must select and appoint two alienists to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. Said alienists so appointed by the court shall be allowed such fees as in the discretion of the court seem just and reasonable, having regard to the services rendered by the witnesses. * * * "

Vermont Statutes (1959) tit. 13, §4803: Whenever a plea of insanity is made, the court "may order the person into the care of the superintendent of the Vermont state hospital, to be detained and observed by the superintendent until further order of such judge, or of such county court, that the truth or falsity of such plea may be ascertained."

Wisconsin Statutes (1957) §957.27: "(1) Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. * * * (3) Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and

opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation. * * * "

Wyoming Statutes (1957) §7-241: "In all cases where any plea of insanity is made, the judge shall forthwith order the commitment of the defendant to the Wyoming state hospital or other suitable institution, for observation and examination by the staff of said hospital and by such doctors and psychiatrists as either the State of Wyoming or the defendant may employ * * * "

United States Code, tit. 18, §4244, 63 Stat. 686: On motion of the United States Attorney alleging that a person charged with an offense may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceeding against him or properly to assist in his own defense, or similar motion by defendant, or on the court's own motion, "the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. * * * "

District of Columbia Code (1961) §24-301(a): Whenever "it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. * * * "

APPENDIX B

Statutes Providing for Examination But Not Specifically Requiring a Psychiatrist

Arizona Rules of Criminal Procedure, Rule 250A: "* * * The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. * * *"

Connecticut General Statutes (Supp. 1961) §54-40: "* * * The judge may, if it appears advisable, appoint not fewer than two nor more than three reputable, disinterested and qualified physicians, who shall examine the accused as to his mental condition and make written report thereof to the court. * * *"

Florida Statutes (1957) §917.02: "When on a prosecution by indictment or information the existence of insanity on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested qualified experts, not exceeding three, to examine the defendant. * * *"

Indiana Statutes (1956) §9-1702: "* * * When an insanity defense is pleaded, the court shall appoint two (2), or three (3), competent disinterested physicians to examine the defendant, and to testify at the trial. * * *"

Louisiana Revised Statutes (1950) §15-268: "Whenever, on a prosecution by indictment or information, the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested physicians not exceeding three to examine the defendant. * * *"

Michigan Statutes (1954) §28.967: "When a person accused of any felony shall appear to be insane or shall have been quitted upon trial upon the ground of insanity, the

court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain the issue of insanity. * * * The court shall call 2 or more reputable physicians and other credible witnesses to testify at said hearing * * *."

Oregon Revised Statutes (1961) §136.150: "* * * The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. * * *"

South Dakota Session Laws (1953) c. 201, §1: "* * * Upon a plea of 'not guilty by reason of insanity' the state shall thereupon be entitled to a reasonable time, as determined by the court, to prepare to meet such issue, and the court shall thereupon require the defendant to submit himself for examination by medical experts selected by the state. The court may also appoint medical experts and require that the defendant submit himself for examination by such court-appointed medical experts."

Virginia Code (Supp. 1960) §19.1-228: If the court or the Commonwealth's attorney has reason to believe that a person charged with crime is in such mental condition that his confinement in a hospital for the insane is necessary for proper care and observation, the court may make such commitment. "In any such case the court, in its discretion, may appoint one or more physicians skilled in the diagnosis of insanity, or other qualified physicians * * * not to exceed three, to examine the defendant before such commitment is ordered, make such investigation of the case as they may deem necessary and report to the court the condition of the defendant at the time of their examination. * * *"

West Virginia Code (1961) §6198: "Whenever any person charged with or convicted of a crime, or acquitted thereof because of his mental condition, is thought to be mentally ill or mentally defective, the judge of the court of record in which he was so charged, convicted, or acquitted, may on his own motion inquire into the mental condition of such person. * * * The judge shall appoint two physicians to examine such person and report in writing on his mental condition. * * *"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 511

JAMES E. BUSH,

Petitioner;

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

JURISDICTION

Although the facts set forth in the jurisdictional statement in Petitioner's brief are true, the Respondent denies that there is a substantial federal question presented for review by this Honorable Court.

QUESTION PRESENTED

In a criminal prosecution of an indigent defendant previously adjudicated to be insane, does the 14th Amendment prohibit the State trial court from finding the Defendant sane based on the testimony of a medical doctor and a number of lay witnesses?

STATEMENT OF THE CASE

Respondent denies every assertion of fact in Peti-

tioner's brief except those specifically admitted herein or supported by the record.

This is a State criminal case in which the Petitioner was convicted of felony theft, habitual criminal in the District Court of Ellis County, Texas. The evidence at the trial showed that Petitioner stole a collection of old coins worth about $600 from his employer (R 93). The jury found that Petitioner had been twice previously convicted of felony offenses less than capital and, therefore, he was sentenced to life imprisonment, the mandatory sentence under Texas law (R 17-19)

The pertinent history of Petitioner begins on October 26, 1923, when he was indicted by the grand jury of Navarro County, Texas, on three separate indictments, one charging theft of a bale of cotton of the value of One Hundred ($100) Dollars; one charging theft of an automobile, and one charging theft of a truck (R 79-87). Before he could be brought to trial on those indictments he was brought before the County Court of Navarro County, Texas, on an inquiry of lunacy and, on February 14, 1924, was found to be of unsound mind as the result of an attack of lunacy of approximately six months duration (R 149). Subsequent to this adjudication of lunacy Petitioner was apparently sent to the Terrell State Hospital for some period of time and subsequently discharged therefrom (R 51; "Appendix A" Respondent's brief in opposition to Petitioner's Application for Writ of Certiorari).

After his release from the Terrell State Hospital Petitioner was convicted of about 24 additional theft offenses (R 62, 73). During the trial on the merits of the case the Defendant's attorney stated that an indictment was introduced which showed that Petitioner

had been convicted or charged in 10 or 15 thefts or theft related cases (R 137). One of the State exhibits printed in the record is an indictment which alleges two previous convictions (R 143).

Petitioner had resided with and worked for the victim of this crime for about four months prior to the date of the offense which took place on October 21, 1960 (R 75, 77). The Defendant was arrested in possession of the stolen coins on October 22, 1960, in Hurst, Texas, (R 94, 95). On October 25, 1960, Petitioner accompanied the sheriff of Ellis County, Texas, to a remote area near Arlington, Texas, and directed the sheriff to the location of the metal box in which the victim had kept the coins which were stolen (R 101). At the scene to which Petitioner had directed him, the sheriff discovered burned coins, the burned remains of the collector's albums into which the coins had been placed by the victim, and the burned remains of other papers which had been in the metal box in which the coin collection had been kept (R 101). On November 3, 1960, the Petitioner was taken to the office of Dr. John Compton, the Ellis County Health Officer, and examined for lunacy by Dr. Compton (R 57, 134, 135). Dr. Compton found the Petitioner to be sane, i.e. that he could distinguish right from wrong both at the time of the examination and at the time of the offense, October 21, 1960 (R 57, 59).

Thereafter, on February 7, 1961, the indictment on which Petitioner was subsequently tried was returned by the Ellis County Grand Jury (R 1-3). The trial was set for April 24, 1961, and on about April 2, 1961, the Court appointed an attorney to represent Petitioner (R 34). On April 21, 1961, Dr. Compton, the Ellis County Health Officer, examined the Petitioner at the

Ellis County jail and again concluded that he was of sound mind (R 57, 59, 135). On the same date, which was only three days before the trial date, the Petitioner's attorney made two motions. In each he recited Petitioner's prior adjudication of lunacy and alleged that Petitioner was a pauper. In the first motion he asked that Petitioner be sent to a mental hospital for diagnosis and observation before the trial (R 3-4). In the second motion he asked that the Court appoint and pay for the services of "a competent independent psychiatrist" (R 5-6). Both motions were refused.

Under Texas law the accused in a criminal case has the right to have a pre-trial hearing on the question of whether or not he is insane at the time of the hearing or was insane at the time of the offense for which he is being tried.

On April 24, 1961, such a preliminary hearing was held at the request of Petitioner (R 6). At this preliminary hearing, the State had the duty of proving beyond a reasonable doubt that the Petitioner was sane at the time of the offense and at the time of the hearing, because, under Texas law, the 1924 adjudication raised a continuing rebuttal presumption of insanity (R 7-8).

Among the testimony offered by the State at the preliminary hearing was the testimony of Dr. Compton, the County Health Officer (R 57-65). Dr. Compton testified that he was a physician of some six years experience in the practice of medicine (R 57). He testified that he examined Petitioner on November 3, 1960, in his office and on April 21, 1961, in the county jail (R 57). Dr. Compton expressed the opinion that the Petitioner was of sound mind and oriented as to time,

place, and person on the date of the offense, on the date of the examinations and on the date of the preliminary trial (R 57-58). He testified that, at his first examination, he took Petitioner's medical history and examined him on his mental capacity to ascertain if he was oriented and if he was having any difficulty with hallucinations (R 58). Dr. Compton further testified that his examination consisted of questions in reference to the Respondent's name, his birthdate, his age, (to see if they corresponded, his age with the right year), questions as to the location where he was, the place, the time, the date, the month, the year; generalities as to who was President of the United States and Governor of Texas; his past medical history, if he has had any serious illnesses; as to any hallucinations, (hearing voices, seeing things that were not actually there); questions as to any paranoid tendency, (a feeling of everybody being against him or any threats to him); questions as to his schooling, how far he went in school; simple mathematical problems to see if he was able to keep a train of thought; questions intended to test his mental ability and thought processes (R 63). Dr. Compton, whose studies in medical school included psychiatry (R 64) and who treats patients with emotional problems in his private practice (R 136) further testified that, in his opinion, it was not necessary for a more thorough examination of Petitioner to be conducted by a psychiatrist or psychologist in order to eliminate the possibility that Petitioner might be insane (R 63). Dr. Compton further testified that he was using the word "insane" as meaning unable to distinguish right from wrong (R 69). In response to questions from the defense Dr. Compton also testified at length about the nature of kleptomania and mental illnesses generally (R 59-64). Specifically, in relation to

kleptomania, Dr. Compton testified that generally, kleptomaniacs regularly steal things that they do not need. That they will go routinely into stores and take things that they do not need and, having stolen those things just put them up and never use them (R 62). Dr. Compton further testified that, in his opinion, Petitioner is not a kleptomaniac (R 64).

At the conclusion of Dr. Compton's testimony a discussion was had between the Court and counsel which established that the State had two or three more witnesses to call and the defense counsel made the following motion: "Your Honor, in view of this, I would like to make the motion that the Court recess in order to allow a doctor we have got to examine this man and who hasn't had the opportunity before, to check with him, possibly over the lunch hour. He just came in." (R 65). The Judge indicated his approval of counsel's request and the Court apparently recessed for not less than a 45 minute lunch period (R 65). After the recess the prosecution called two more witnesses (R 65-68), both of whom were laymen and both of whom testified that from their observations, they thought that Petitioner was of sound mind both at the time of the preliminary hearing and at the time of the offense (R 66-68). The State having rested, the defense called as its first witness Dr. James A. Dyal, an Assistant Professor in psychology at Southern Methodist University. (R 68). Dr. Dyal testified that he has a Ph.D. degree in psychology from the University of Illinois and has done clinical work dealing with mentally deranged persons (R 68-69). So far as the record reflects Dr. Dyal is not a physician nor is he licensed to practice medicine. Dr. Dyal testified that he had examined the Petitioner in a 20 minute interview (R 69, 70). Dr. Dyal

further testified that his examination was not adequate for him to form an opinion about the Petitioner's mental condition (R 69, 70). The record does not reflect when Dr. Dyal examined Petitioner, where the examination took place, nor why the examination consisted of only a 20 minute interview. Dr. Dyal then testified as to what, in his opinion, would constitute an adequate examination in order to determine whether an individual is "insane" or not (R 70-72). Dr. Dyal further testified that a kleptomaniac is a mentally ill person and that ". . . typically a person who is a kleptomaniac steals because he cannot keep from stealing and does not attempt to turn whatever he steals into gain for himself." (R 73). Dr. Dyal testified that he did not find any symptoms of mental illness in Petitioner and that, in his opinion, no one could make such a decision based on such a brief examination (R 73-74).

At the conclusion of Dr. Dyal's testimony, Petitioner's attorney called the victim, Mr. L. C. Hackler, as his next witness (R 75). The victim testified, to the obvious surprise of the defense attorney, that, in his opinion, the Petitioner could distinguish right from wrong at the time of the theft (R 75, 77). At the conclusion of the victim's testimony both the State and the defense announced that they were finished with the presentation of evidence (R 78). The Court then properly instructed the jury as to their duties and instructed them that the Defendant was presumed to be insane until his sanity was shown by the evidence beyond a reasonable doubt (R 7). The Court also instructed the jury as to the legal definition of insanity and furnished them with appropriate forms on which to return whatever verdict they decided to render (R 7-8). The jury returned a verdict finding that the Peti-

tioner was sane both at the time of the offense and at the time of the pre-trial hearing (R 8). Thereafter, the Court entered an appropriate judgment on the verdict (R 9).

The next day the trial on the merits commenced with an opening statement by the defense attorney to the jury that the Petitioner's answer to the indictment would be a plea of not guilty by reason of insanity at the time of the offense and insanity at the time of the trial (R 91-92). The evidence for the State was similar to that which was introduced the day before and established beyond doubt that the Petitioner had stolen a coin collection of a value of approximately $600 from the victim, Mr. L. C. Hackler; and that the Petitioner was the same person who had been previously convicted of two non-capital felony offenses (R 92-126).

The defense recalled the victim, Mr. L. C. Hackler, who again reiterated that he thought that the Petitioner did know right from wrong (R 128). After a recess during which defense counsel conferred with a witness, (R 129) the defense called a Mr. P. L. Simms who had been one of Petitioner's employers (R 130). In response to the defense question about whether he thought Petitioner might be mentally defective, Mr. Simms expressed an opinion that Petitioner was not mentally defective (R 131). The defense did not recall Dr. Dyal nor does the record reflect why he was not recalled.

The defense then made a motion that the Court suspend the proceedings until "we send this man to a mental institution for closer observation, or in the alternative we would move that the Court appoint a psychiatrist or psychologist, somebody competent in men-

tal defects to examine this defendant and evaluate his mental condition in view of the previous conviction of the judgment of insanity." (R 131). The Court offered to appoint the County Health Officer and when the defense counsel indicated that he would not be satisfied with the appointment of anyone except a psychologist or psychiatrist, the Court overruled the motion. (R 131).

After the defense rested, the State introduced the judgment from the sanity hearing which had been conducted the previous day (R 134) and introduced evidence of the Petitioner's sanity similar to that which had been introduced the day before with the exception that one of the laymen who had testified the day before was not recalled and the jailer, who had not testified the day before, was called and expressed an opinion that the Petitioner was sane (R 124-125). Dr. Compton again testified about his examinations of Petitioner and again expressed his professional opinion that Petitioner was of sound mind (R 135). He further testified that the examination that he had given Petitioner was the same psychiatric examination that a psychiatrist or psychologist would give (R 135). He further testified that he had much occasion to treat the diseases of the mind and actually diagnose psychiatric patients (R 136). He also testified that the type of examination he gave Petitioner would detect a number of different types of mental illness (R 136). In answer to further questioning Dr. Compton testified that, applying the legal test of right and wrong he found no instance of Petitioner being of unsound mind and did not believe that further tests were necessary (R 138-139). Dr. Compton further testified that, when the Petitioner first came to his office for examination, he was brought

in from the jail for Dr. Compton to check him for insanity. (R 139).

Both sides having concluded their presentations the Court charged the jury on the elements of the offense, the burden of proof and their duty as jurors (R 11-15). The Court further charged the jury that under the law Petitioner was presumed to be insane; that the burden was upon the State to prove by legal evidence beyond a reasonable doubt that the Defendant was sane at the time of the commission of the offense and that he was sane at the time of the trial, before the jury would be warranted in finding that the Petitioner was of sound mind at either of said times; and that if the State failed to so prove then the jury was to find that the Defendant was insane at both times (R 15-16). The charge also cautioned the jury that they could not consider the failure of the Petitioner to testify as evidence against him and furnished them with appropriate forms for their verdict (R 16-17). After deliberation, the jury found the Petitioner sane both at the time of the offense and at the time of the trial; found that he was guilty of the offense with which he was charged and found that he had been previously convicted of two felony offenses less than capital (R 14, 16). Under the Texas law, the mandatory sentence upon such a conviction is confinement in the penitentiary for life and on April 25, 1961, judgment was entered and sentence pronounced (R 18-19).

Petitioner made a motion for new trial and perfected his appeal as recited in the last paragraph on page 5 of Petitioner's brief.

ARGUMENT

I.

UNDER THE FACTS OF THE INSTANT CASE THE STATE TRIAL COURT HAD NO DUTY TO APPOINT A "PSYCHIATRIST" OR OTHER SPECIALIZED TECHNICAL ASSISTANTS TO THE DEFENSE COUNSEL ON REQUEST.

It is undisputed that the State of Texas does not have any statutes which allow the trial court to appoint a specialist or other technical assistant to the defense counsel. In the case at bar, the very able and astute defense counsel, three days prior to the scheduled trial date, filed an unsworn motion signed by himself, alleging that the Petitioner was indigent and asking the court to "appoint and pay" for the services of an independent "psychiatrist" to make a pre-trial examination of Petitioner, and that the court suspend the proceedings until such time as the "psychiatrist" had completed his examination (R 5-6). The denial of this motion is now alleged to have constituted a deprivation of Petitioner's rights under the 14th Amendment to the Constitution of the United States.

In *United States ex rel. Smith v. Baldi*, 344 U. S. 561, 73 S. Ct. 391 (1953) this court had before it a case where the Petitioner contended that the failure of the Pennsylvania trial court to appoint a "psychiatrist" for him deprived him of due process. The trial court had before it the testimony of a "psychiatrist" who examined Smith at the request of the court and the testimony of two "psychiatrists" called by the defense. id. p. 568 U.S. In answer to Smith's contention that the trial court had a duty to appoint a "psychiatrist" to afford him adequate counsel the court said (at p.

568 U.S.): "We can not say the State has that duty by constitutional mandate. See *McGarty v. O'Brien*, 1 Cir., 188 F.2d 151, 155."

Not only is there no provision in the State law which allows the procedure requested by the Petitioner, (R 156-157) but the motion raised an even more fundamental problem by use of the word "psychiatrist." In Texas, a proper licensed physician can treat any disease, disorder or deformity by any means or method and, therefore, can become a "psychiatrist" simply by calling himself one (Article 4495-4512, Texas Civil Statutes). Under the Texas law psychiatrists are not separately licensed nor is there any definition of psychiatry or a psychiatrist in the Texas statutes. It will, therefore, be assumed for the purposes of this brief, that by the term "qualified psychiatrist" Petitioner's counsel meant a physician who was a fellow or member of the American Psychiatric Association.

II.

THE PETITIONER WAS ACCORDED AN ADEQUATE OPPORTUNITY TO ASSERT THE ISSUE OF HIS ALLEGED INSANITY AND WAS EXAMINED BY A QUALIFIED INDEPENDENT PHYSICIAN WHOSE SERVICES WERE AVAILABLE TO THE PETITIONER PRIOR TO HIS TRIAL.

That the State authorities treated the possibility of Petitioner being mentally incapacitated with considerable seriousness is clearly illustrated by the record. A few days after his arrest and return to Ellis County the Petitioner was taken from the jail to the office of Dr. John Compton, the Ellis County Health Officer who examined him to determine whether he might be

insane (R 57, 134, 135). This was no hurried examination and observation of Petitioner in a prison cell, without privacy or in the presence of an attorney; this was an examination performed by a licensed reputable physician whose legal duty includes the examination and treatment of prisoners in the county jail (Article 4427, Texas Civil Statutes). The County Health Officer, Dr. Compton, was a physician of some six years experience in the practice of medicine (R 57) whose studies in medical school had included psychiatry (R 64) and who has many occasions to diagnose and treat mental illness and psychiatric problems in his practice in Ellis County (R 64, 136, 57). The examination Dr. Compton administered was the same psychiatric examination that a psychiatrist or psychologist would give and it would detect a number of different types of mental illness including schizophrenia, a paranoid personality or other emotional difficulty (R 136-137). The attempt by Petitioner's counsel in their brief to cast Dr. Compton in the role of ignorance and vanity is wholly unsupported by the record and is an assumption based upon medical authorities whose stated requirements are far beyond those which Petitioner's own witness, Dr. Dyal, testified would be necessary to adequately determine Petitioner's sanity. A comparison of the testimony of Dr. Dyal as to what he felt an adequate examination would include (R 71) with the examination actually performed by Dr. Compton (R 58-63) reveals that virtually all of the tests Dr. Dyal described were actually performed by Dr. Compton on his pretrial examination of Petitioner. It cannot be said that, as a matter of constitutional law, the failure of Dr. Compton to be a member of the American Psychiatric Association and perform the two or three other tests

described renders him incompetent to testify as to his findings. It is the well established rule in the majority of jurisdictions that a physician is entitled to testify, as an expert witness, as to the results of his examinations even though he is not a *specialist* in treating the particular portion of the body or the particular disorder or disease about which he is testifying. See for example: *Parker v. Guenther*, 164 Atlantic 2d 152 (Supreme Court of Vermont 1960); *Shorer v. Iowa Lutheran Hospital*, 107 N.W. 2d 85 (Supreme Court of Iowa, 1961); *Angle v. Rand Express Lines, Inc.*, 168 A. 2d 423 (Superior Court of New Jersey, 1961); *Pawlowski v. Marino*, 1958 A. 2d 218 (Superior Court of New Jersey, 1960); *Wolfinger v. Frey*, 162 A. 2d 745 (Court of Appeals of Maryland, 1960); in Re: *Millar's Estate*, 345 P. 2d 1033 (Supreme Court of Kansas, 1959); *Pollard v. Howfield*, 170 F. 2d 170, (U.S. Court of Appeals D.C. Circuit 1948); *Sher v. De Haven et al.*, 199 F. 2d 777 (U.S. Court of Appeals, District of Columbia Circuit 1952).

Although Petitioner's brief attempts to brush aside the testimony of the laymen who expressed an opinion as to Petitioner's sanity, the Courts have long recognized that the testimony of even untrained laymen can be of considerable value in determining sanity where the witness has had prolonged and intimate contact with the accused. *Hopkins v. United States*, 275 F. 2d 155 (U.S. Court of Appeals D.C. Circuit, 1959) and *Carter v. United States*, 252 Fed. 2d 608 (U.S. Court of Appeals D.C. Circuit, 1956). It cannot be denied that the testimony of the victim, Mr. L. C. Hackler, (R 75, 126) and the testimony of Mr. P. L. Simms (R 130) meet the test laid down for the testimony of lay witnesses set out by the Court in *Carter v. U.S. id* p. 618.

The mere fact that in 1956, 32 years after Petitioner was committed for lunacy, the State of Texas adopted a constitutional amendment prohibiting commitment except on ". . . medical or psychiatric" testimony (Article I, Section 15(a), Texas Constitution) does not mean that a layman's testimony can never form the basis for a sanity verdict. In fact, in this very case, the Court of Criminal Appeals of Texas held that a defendant in a Texas criminal case may successfully plead insanity in bar to prosecution or as a defense or *as a bar to punishment* though the evidence may not be such as would authorize his commitment (R. 156).

III.

THE STATE OF TEXAS GAVE PETITIONER AMPLE OPPORTUNITY TO ASSERT HIS DEFENSE OF INSANITY.

Petitioner's mental condition was a matter of serious concern to the State's authorities from the time he was arrested for the offense at bar to the present date. Petitioner was examined by the County Health Officer shortly after his arrest and return to Ellis County and before he was indicted for the offense.

The trial court appointed an attorney to represent Petitioner even though Petitioner had been convicted of 24 offenses after his adjudication of lunacy which, under Texas law, meant that Petitioner had "clearly appeared sane" on 24 separate occasions (Article 501, Texas Code of Criminal Procedure).

Texas law provides for a pre-trial hearing on the question of sanity and, in the case at bar, Petitioner was accorded that right upon his attorney's request. At the hearing Petitioner's attorney was given a recess

to have a "doctor" examine Petitioner (R 65) and, despite the remoteness of the adjudication of lunacy, the jury was instructed that the State had the burden of proving Petitioner's sanity beyond a reasonable doubt (R 7-8).

On the day following the pre-trial insanity hearing, the trial of the cause on the merits was had and Petitioner was allowed to plead not guilty by reason of insanity both at the time of the offense and at the time of the trial (R 91). During the trial on the merits defense counsel moved that the proceedings be suspended and Petitioner be examined for insanity by a psychologist or psychiatrist "someone competent in mental defects" (R 131). The defense did not suggest the appointment of any one particular person to make this examination and the Court offered the services of the County Health Officer, Dr. John Compton, whose qualifications have been previously discussed (R 131). The defense declined the Court's offer and rested (R 131).

At the conclusion of the trial on the merits Petitioner was again accorded the full benefit of the presumption of insanity arising from his previous adjudication of lunacy. The Court instructed the jury that the burden was upon the State to prove Petitioner's sanity beyond a reasonable doubt and that Petitioner was presumed to be insane and the jury should so find unless they were convinced by the evidence beyond a reasonable doubt of Petitioner's sanity (R 15-16).

Even though Petitioner is presently confined in the Texas prison, he is still a subject of concern to the State. If, at any time, he is found to be mentally ill there is elaborate state machinery by which the prison psychiatrist can have him hospitalized (Article 932-1, Texas Code of Criminal Procedure).

IV.

THE RULE WHICH PETITIONER URGES THIS COURT TO ADOPT WOULD PLACE AN IMPOSSIBLE BURDEN ON THE STATE OF TEXAS AND COULD NOT BE ADMINISTERED.

The Texas law does not separately license psychiatrists nor does it define psychiatrists or limit who may call himself a psychiatrist.

There are, of course, a number of physicians who purport to be psychiiatrists, some of whom are certified in psychiatry by the American Board of Psychiatry and Neurology. At the present time there are about 399 "psychiatrists" practicing in Texas (*Mental Health Services*, a directory for Texas, 4th Edition, 1962-1963, prepared by the Division of Mental Health, Texas Department of Health, and the Texas Association for Mental Health). These 399 "psychiatrists" are located, however, in only 34 Texas counties. There are 220 Texas counties which still do not have a resident "psychiatrist" (*More Hands to Help*, published by Texas State Department of Health, Division of Mental Health, January 1963 copied herein as Appendix A). It would be impossible in the State of Texas to require the appointment of a "psychiatrist" to examine the Defendant in a criminal case tried in one of those remote counties. Admittedly, the State has a duty to furnish all the Constitutional safeguards regardless of the difficulty encountered but this illustrates that the Petitioner is advocating an impossible burden and Respondent respectfully submits that the Constitution does not require the State to bear such an impossible burden.

V.

THE EFFECTIVENESS OF PETITIONER'S COUNSEL WAS NOT IMPAIRED BY THE REFUSAL OF THE COURT TO GRANT HIS MOTION FOR THE APPOINTMENT OF A PSYCHIATRIST.

Three days before the scheduled Trial date, Petitioner made a motion that the trial court "appoint and pay for a competent independent psychiatrist's services so that the Defendant can adequately prepare his defense. . . ." This is not a case where a prosecution, calling upon the vast resources at its command, brought forth high priced expert testimony while denying the Defendant any form of assistance whatsoever. The record reveals that the State relied upon the testimony of a competent, reputable, independent physician whose official duties as County Health Officer, required him to examine and treat prisoners in the county jail. There is no showing in this record that Petitioner or his counsel requested the assistance of, or consultation with the County Health Officer. The record does not reflect any attempt by the Petitioner or his counsel to get the County Health Officer to perform any of the tests the absence of which Petitioner now contends renders the County Health Officer's testimony of no value. In fact, when the court offered to appoint the County Health Officer to make further studies of Petitioner's mental condition the offer was declined by the defense (R 131).

Despite Petitioner's solemn avowal before this court that the denial of court appointed technical assistance prejudiced the presentation of his case in the State trial court, a reading of the record illustrates that Petitioner's counsel did not seriously want the very tech-

nical assistance the absence of which he complains about here. At page 35 of Petitioner's brief it is asserted that it is "a principal of medical ethics that the indigent always have a call on a doctor for his free services." The record before this court does not reflect that the Petitioner's counsel made any attempt whatsoever to avail himself of any of the "free services" which he now so blandly asserts would be readily available to an indigent defendant. In fact, there is no showing whatsoever in the record that Petitioner or his counsel made any attempt to obtain the services of a psychiatrist or psychologist except by virtue of the motion made by the defense counsel three days before the scheduled trial date. In addition, however, when, at the pre-trial hearing, counsel moved the court to recess to allow a "doctor" that he had just obtained to examine Petitioner over the lunch hour (R 65). The court granted that request. After lunch the court reconvened, the prosecution presented two more witnesses and rested (R 65-68). The defense then called Dr. James A. Dyal, a psychologist and an assistant professor of psychology at Southern Methodist University who testified that he found no symptoms of mental illness or defect in Petitioner (R 73), and that he had been unable to form an opinion as to Petitioner's sanity because he had only interviewed Petitioner for twenty minutes at some unspecified previous time (R 69, 70). Dr. Dyal also testified that an adequate examination of Petitioner would consume "two or three hours of a psychiatrist's or psychologist's time . . ." (R 72). Instead of requesting the court to grant Dr. Dyal this additional time which, according to his own testimony, would have been sufficient for him to form an opinion as to Petitioner's sanity, the defense counsel chose to proceed with the hearing calling an additional witness

after the conclusion of the examination of Dr. Dyal (R 75, 78). If Petitioner's counsel seriously wanted Dr. Dyal to perform what he (Dr. Dyal) would have considered an adequate examination surely counsel would have requested the court to grant an additional recess for this purpose. Although Petitioner asserts in his brief that Dr. Dyal was "required" to make his examination over the brief luncheon recess, the record reflects that the defense asked for a recess over the luncheon period and the court granted it. In addition, there is no showing in the record that the Petitioner, who had been confined in the County jail, was not available for examination on a previous date if counsel had attempted to get Dr. Dyal from Dallas to examine Petitioner at that time. In fact, the record simply does not reflect that the recess was necessary since Dr. Dyal might well have been available to examine Petitioner previously if he had been requested to do so. One further aspect of the defense handling of Dr. Dyal and his testimony indicates further that defense counsel did not seriously desire his assistance or testimony. It is undisputed that the trial on the merits of this case was not until the next day. Dr. Dyal was obviously present in the court room up until the time he concluded his testimony and the only witness who testified after him was Mr. Hackler whose examination must have been brief because it only occupies four pages of the record (R 75-78). The record does not reflect that counsel made any attempt to have Dr. Dyal conduct an examination of Petitioner after the conclusion of the proceedings on the pre-trial sanity hearing nor is there any explanation in the record why he could not have done so had he so desired. Respondent submits that this entire conduct on the part of defense counsel was intended as a matter of trial tactics and shows that coun-

sel did not seriously feel the need for the assistance of Dr. Dyal. During the trial on the merits, the defense did not recall Dr. Dyal nor did the defense attempt to explain why Dr. Dyal had not examined Petitioner in the time between the pre-trial hearing on sanity and the trial on the merits, if in fact such an examination did not take place. During the trial on the merits, however, defense counsel did elect to move that the proceedings be suspended until the Petitioner could be sent to a mental institution for closer observation or that the court appoint a psychiatrist or *psychologist* to examine the Defendant. The court offered to appoint the County Health Officer (R 131) and counsel, knowing that the County Health Officer did not claim to be a "psychiatrist or psychologist," declined the offer (R 131). If Petitioner's counsel seriously desired the services of a psychologist, why didn't he make full use of the services which Dr. Dyal was obviously willing to render since he had driven from Dallas to Waxahachie, the site of the trial, and apparently would have been willing to make the full examination? If defense counsel seriously felt that the additional tests which Dr. Dyal described in his testimony (R 71), some of which had not been performed by Dr. Compton, were necessary to fully assess the Petitioner's mental condition, why didn't he request that the County Health Officer perform those tests when the Court offered to appoint the County Health Officer to make whatever examination and observation counsel referred to in his motion to suspend the proceedings?

The entire contention that Petitioner's sanity was seriously in issue in this case is the result of a unique feature of the Texas law which allows a judgment of lunacy entered 37 years before the trial to raise a con-

timuing presumption of insanity regardless of its remoteness and regardless of the fact that it does not indicate a permanent type of insanity but instead, recites that Petitioner has had a number of "attacks" of lunacy. In some jurisdictions the remoteness of the 1924 judication would have so materially weakened the presumption that it would have been practically neutralized, for example see: *Gulley v. Common-Wealth*, 284 Ky. 98, 143 S.W. 2d 1059 (1940); *Common-Wealth v. Calhoun*, 238 Penn. 474, 86 A. 472 (1913); *Langdon v. People*, 133 Ill. 382, 24 N.E. 874 (1890); *People v. Maynard*, 347 Ill. 422, 179 N.E. 833 (1932); and note 27 A.L.R. 2d p. 145 et seq. This Petitioner, however, has been uniformly accorded the full benefit of a presumption of insanity by the courts of Texas, having even obtained his release from the penitentiary on a writ of habeas corpus from the Court of Criminal Appeals of Texas because of the failure of a previous trial court to appoint an attorney to represent him. *Ex parte Bush*, 313 S.W. 2d 287 (Texas Criminal Appeals 1958).

The record in this case reflects that the Petitioner was accorded every possible protection to assure that he was able to present his defense. He was furnished counsel without showing he was indigent. Before trial, he was given a comprehensive psychiatric examination by a competent, experienced, licensed, independent physician whose legal duty was to examine him and treat him if he was ill. He was accorded a pretrial hearing on insanity, during which his counsel was given every opportunity to present any evidence of insanity and, at the conclusion of which, he was given the benefit of a stronger presumption of insanity than most jurisdictions recognize. At the trial on the merits

the next day he was again given every opportunity to present his defense, including the opportunity to request further examination by the County Health Officer.

Respondent respectfully submits that this Petitioner has been accorded every aspect of due process of law including adequate psychiatric examination.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted.

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"EXHIBIT A"

MORE HANDS to HELP

TEXAS STATE DEPARTMENT of HEALTH

Division of Mental Health

Reprinted from
Texas Health Bulletin

MORE HANDS to HELP

The number of psychiatrists in Texas has increased dramatically this past year. The location of these psychiatrists, in relation to the State's population, is the subject of this report.

by
James Otis Smith
and
Fred R. Crawford
Mental Health Division

The number of psychiatrists practicing in Texas increased to a new high in September, 1962. A recent count, compiled by the research and epidemiology program of the State Health Department's Mental Health Division, indicates a total of 399 psychiatrists who are working in the State.

This total includes all psychiatrists listed in *Mental Health Services: A Directory for Texas, 1962*, published jointly by the Division of Mental Health and the Texas Association of Mental Health. The listing was confirmed by comparisons with the *List of Fellows and Members of the American Psychiatric Association, 1961-62, and the Directory of Medical Practitioners Authorized to Practice Medicine in Texas* compiled as of March, 1962. Also information was gathered from local communities in which psychiatrists practice.

In March, 1961, only 290 psychiatrists were known to be practicing in Texas.

Approximately 46 percent (187 doctors) of the 399 psychiatrists in Texas are known to be practicing in full-time institutional settings such as State or V.A. clinics and hospitals, military bases, clinics in college health centers, etc. The remaining 54 percent are in private practice.

Psychiatrists and the Texas Population

Although psychiatrists are located in only 34 of 254 Texas counties, these 34 counties contain roughly 66 percent of the total Texas population.

Institutional settings determine the location of the 46 percent of psychiatrists who practice in these areas. However, only four counties (Cherokee, Howard, Kaufman, and Kerr—all locations of a State mental hospital) have psychiatrists in institutional settings but none in private practice—and these four counties contain only one percent of the total State population.

The overall ratio of psychiatrists to the State's population in 1961 was one psychiatrist to 33,650 persons (290 psychiatrists contrasted with an estimated State population of 9,743,949.) Today, the estimated ratio of psychiatrists is one to 25,063 persons (399 psychiatrists contrasted with an estimated population in excess of 10,000,000).

The overall ratio for the entire United States population in September, 1961, was about one psychiatrist for 18,000 population. Texas is still below the national average of several years ago even with this recent increase of psychiatrists in the State.

It is encouraging to find that psychiatrists are in private practice in 30 Texas counties, and that 65 percent of the Texas population lives in these 30 counties.

Urbanization and Location of Psychiatrists

When counties are grouped on the basis of population size we find that the ratio of psychiatrists to population varies. Those counties containing the larger urban-industrial centers of the State, such as Dallas, Fort Worth, Houston, San Antonio and El Paso, claim the bulk of the State's psychiatrists. As a group, these counties have the most favorable ratio of psychiatrists to population.

As county population size decreases, the ratio of psychiatrists to population becomes less favorable. However, there are noticeable gaps in this pattern in Texas. Hidalgo County, for example, with a population of well over 100,000 still has no psychiatrist. Three other counties—Orange, Webb, and Brazoria (except that Beaumont, next to the Orange County line, has four)—with populations of 62,043, 66,529, and 78,080, respectively, also have no psychiatrists at this writing.

In Texas' most sparsely populated counties, considered as a group, the ratio of psychiatrists is one per 508,735 persons. For the group of counties between 25,000 and 50,000 population, the ratio decreases to one per 75,000 persons. In the third group of counties, those with populations ranging between 50,000 and 100,000, the ratio psychiatrists is one per 43,375 persons. And in the group of counties with populations ranging over 100,000, the ratio is one psychiatrist per 15,396 persons.

(These ratios are approximations because there are no current figures for the county populations as of September, 1962.)

What Does This Mean?

On the basis of these facts, it may be concluded that Texas has "more hands to help" than ever before to serve those citizens who are mentally ill. But, at the same time, the gross ratio of psychiatrists to the population is still unfavorable—compared to that of the nation.

In Texas there are still vast areas outside urban-industrial centers with

no psychiatric resources available. And finally, should the trend towards an increasing number of psychiatrists in Texas continue, we may look forward to a more adequate availability of psychiatric skills for Texans in the future.

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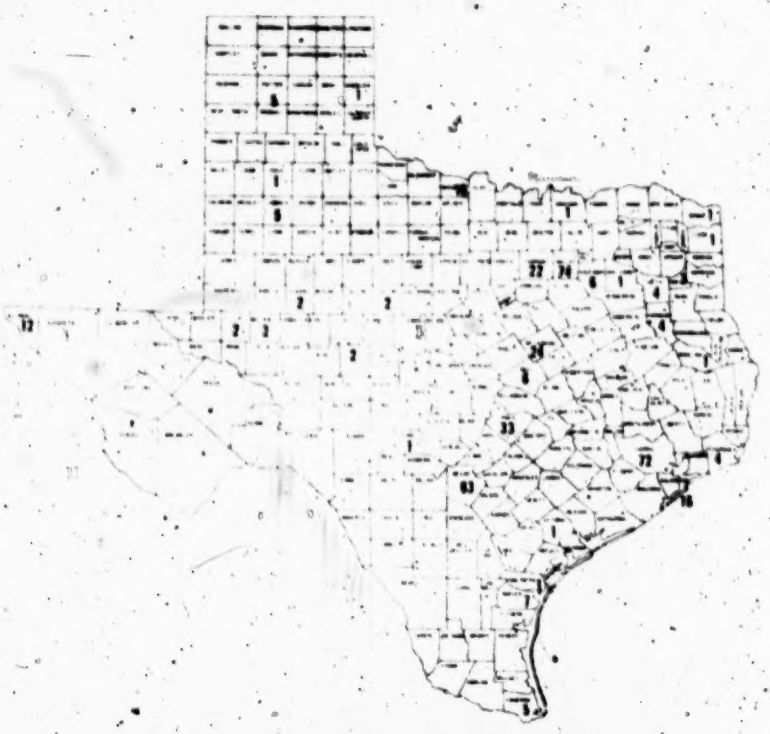

DISTRIBUTION OF PSYCHIATRISTS IN TEXAS
BY SIZE COUNTY AND PERCENT POPULATION, SEPTEMBER, 1962

County Size	Number of Counties	Per Cent of States Population[a]	Number of Counties with Psychiatrists[b]	Number of Psychiatrists	Per Cent of Psychiatrists in Counties	Ratio of Psychiatrists to Population
Below 25,000	192	20.9(2,034,939)	4	4	1.0	1:508,735
25,000-50,000	34	12.3(1,200,304)	7	16	4.1	1: 75,019
50,000-100,000	11	8.5(824,129)	8	19	4.8	1: 43,375
Over 100,000	16	58.3(5,684,577)	15	360	90.1	1: 15,790
TOTAL	253[c]	100.0(9,743,949)	34	399	100.0	1:24,421

[a]Source: Population Estimates for Texas Counties, April 1, 1961. Prepared by The Population Research Center, Department of Sociology, The University of Texas.

[b]Source: Mental Health Services: A Directory for Texas, 1962. Published by the Division of Mental Health, Texas State Health Department, and the Texas Association for Mental Health, Austin, Texas.

[c]For purposes of this analysis, Potter and Randall counties have been combined.

Office Supreme Court, U.S.
FILED
FEB 23 1963
JOHN F. DAVIS, CLERK

No. 511

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

JAMES E. BUSH,

Petitioner

vs.

THE STATE OF TEXAS

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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STATEMENT

Illustrative of the concern which the State has of Petitioner and of his health, he was examined subsequent to the filing of the Brief for the Respondent by Dr. Adolf Hug, M.D. A copy of a Diagnostic Summary prepared by Dr. Hug is presented herein as Exhibit "A." Pursuant to this examination, Petitioner has been transferred to the State Mental Hospital at Rusk.

Texas, under the provisions of Article 932-1, Section 11, Texas Code of Criminal Procedure, as shown by Exhibit "B."

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

SAM R. WILSON
Assistant Attorney General

ALLO B. CROW, JR.
Assistant Attorney General

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Capitol Station
Austin, Texas

BRUCE ALLEN
County Attorney
Ellis County
Waxahachie, Texas

Attorneys for Respondent

EXHIBIT "A"

WYNNE TREATMENT CENTER

Diagnostic Summary

Name: BUSH, James E. T D C No. 165754
Location: Wynne Farm.

I, the undersigned, Doctor A. Hug, examined on this date, James E. Bush, TDC # 165754, an inmate of the Wynne farm and came to the following conclusions.

James is a 64 year old white widower. He was born and raised in a stable farm family situation, together with two brothers and four sisters. None of his immediate relatives at any time were in psychiatric care. He attended the third grade and later worked mainly as a blacksmith. He was married once and has two children. As far as we know from his record he was since 1937 seven times in prison for various offenses with also eight escapes listed. According to the same record he was in Terrell State Hospital in 1924 for mental observation.

On examination patient showed marked psychomotor retardation. He appears to be extremely withdrawn, autistic, isolated from reality and encapsulated in himself. He appears to have no drive or interests. In his verbal productions he is very vague. He is only poorly oriented, giving the date as somewhere in January of 1963 and showed marked difficulties in recalling his past history, or attending to any tests of his present memory capacity. He seems to be of low borderline intelligence. As reason for his various crimes he gives —"I always like to help somebody." There are definite lapses in his trend of thought so that he at times ap-

pears to be odd in his statements or difficult to understand, as he, on the other hand, sometimes has difficulties to understand the examiner.

All of the above evidence if not otherwise stated was given by James during a forty-five minute interview.

From James' history of a social failure and from the present evidence, mainly: marked autism and incoherent thinking, we come to the conclusion that James suffers from *simple schizophrenia.*

It is common knowledge that people who suffer from simple schizophrenia may go through life without calling the attention of a psychiatrist, since they may be distinguished as habitual criminals, alcoholics, vagabonds, etc. They all tend to run a protracted course which practically always starts early in life. They may deteriorate, but usually they go on without much deterioration. We have no doubts about the diagnosis of James, the only question we have is how much of the psychotic picture (memory difficulties) at the present time may be due to organic deterioration, though, for instance, arteriosclerosis or to his autism and lack of interest. On the assumption of the above diagnosis we would have to assume that James was only partly or not at all responsible for his acts, for very many years.

Adolf Hug, M.D.

Psychiatric resident, Houston State Psychiatric Institute, Houston, Texas.
Born 1926 in Zurich, Switzerland.
Trained at University of Zurich.
Holding Swiss State Board and Board for Psychiatry in Switzerland.
American training: one year internship, three years psychiatric residency.

AH:rdm

EXHIBIT "B"

THE STATE OF TEXAS,
COUNTY OF WALKER

Before Me, the Undersigned Authority, on this date personally appeared Richard C. Jones, who, after being duly sworn did depose and say:

My name is Richard C. Jones. I am Assistant Director of the Texas Department of Corrections, in charge of treatment and welfare.

Pursuant to a medical examination, by a prison physician, of James E. Bush, an inmate of the Texas Department of Corrections, under the authority of Article 932-1, Texas Code of Criminal Procedure, James E. Bush has this date been transferred to the State Mental Hospital at Rusk, Texas, for such treatment, if any, as may be deemed necessary by the authorities of said mental hospital.

/s/ Richard C. Jones

SUBSCRIBED And SWORN TO BEFORE ME, on this the 21st day of February, 1963.

/s/ Waymon Wooderson
Notary Public: Walker County, Texas

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POST-ARGUMENT BRIEF FOR THE PETITIONER

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POST-ARGUMENT BRIEF FOR THE PETITIONER

This case was ordered for argument February 25th and argued February 26th. On February 23rd respondent filed a Supplemental Brief in which, with commendable candor, it advised the Court that on February 6th a psychiatrist chosen by the state had examined petitioner and found him "only partly or not at all responsible for his acts, for very many years." The Supplemental Brief further disclosed that on February 21st petitioner was transferred from the penitentiary to a mental hospital under the provisions of Article 932-1 of the Texas Code of Criminal Procedure.

Quite naturally much of the oral argument was devoted to the effect which these new facts should have on disposition of the case. It is clear that they do not make the case moot. Under § 11(b) of Article 932-1, petitioner "remains under the jurisdiction of the Texas Prison System,"

and it is further provided in § 15 of that article that petitioner is to be returned to the penitentiary "when the head of the State mental hospital determines that a prisoner whose sentence has not expired no longer requires hospitalization for mental illness or will not benefit from continued hospitalization." Nor was the Supplemental Brief a confession of error by respondent. Counsel for the state asserted flatly in open court that the state was not confessing error, and argued with vigor that there was no error and that the conviction should be affirmed, despite these recent developments.

It might be argued from *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 49 (1947), that the facts thus put forward by respondent have no proper bearing in this case other than to suggest the question of mootness. The Court, however, at oral argument, expressed considerable interest in whether it might be appropriate to vacate the judgment of the Texas Court of Criminal Appeals and remand the case to that court for consideration in the light of these facts. At oral argument the Assistant Attorney General declared that the facts in the state's Supplemental Brief were of "no legal relevance," and stated that there was no judicial remedy available to petitioner under Texas procedure by which relief could be given him on the basis of these facts. This was also the understanding of counsel for the petitioner, but since the matter had come up such a short time before argument, petitioner's counsel were not fully briefed on this question, and requested leave, granted by the Chief Justice, to file a post-argument brief limited to that question.

Further examination of the Texas law persuades petitioner that counsel for the state were right when they told the Court that no remedy could be afforded petitioner in the Texas courts on the basis of the facts now brought to

this Court's attention. The Texas statutes and decisions indicate rather clearly that: (1) no relief is available to petitioner in the Court of Criminal Appeals; (2) no relief is available to petitioner in the District Court; and (3) even if there were no procedural bar, it is highly doubtful whether Texas courts would give relief on this showing.

I.

The rule is well settled that the Texas Court of Criminal Appeals will not consider ex parte affidavits, or other similar matter outside the record, whether filed by the state or by the defendant. See *Boyce* v. *State*, 62 Tex.Cr. 374, 377, 137 S.W. 116, 118 (1911), and the many similar holdings cited in 5 *Tex.Jur.2d* § 115 (1959). The court put the matter this way in *Pye* v. *State*, 71 Tex.Cr. 94, 101, 154 S.W. 222, 226 (1913):

> It may be that in some cases facts are developed, after the trial of a case, which would cast some doubt as to the guilt of an accused person; but we are permitted to pass alone on the record as made in the trial of the case, for we are but to review the proceedings of that court. If the evidence sustains the verdict of the jury, and the court has committed no error, we have no option but to affirm the case.

Three cases, of many which might be cited, illustrate the rigidity with which the Texas Court of Criminal Appeals applies this rule. In *Turpin* v. *State*, 149 Tex.Cr. 179, 184, 192 S.W.2d 277, 279 (1946), after affirmance of a conviction for statutory rape, defendant made a timely motion for rehearing, appending an affidavit from the prosecutrix in which she retracted the testimony she had given at the trial. The court held that it could not consider such an affidavit

since it had not been made a matter of record in the district court at the proper time.

An even more aggravated case is *Ballew v. State*, 82 Tex.Cr. 398, 199 S.W. 1109 (1917). Ballew and Walchek were indicted for a crime. The cases were severed. Ballew went to trial in Waller County and was convicted. He was unable to call Walchek as a witness at his trial because of the Texas rule that a co-defendant is incompetent to testify for the defense until after he has been acquitted or the prosecution against him dismissed. Texas Code of Criminal Procedure, art. 711; 1 McCormick & Ray, *Texas Law of Evidence* § 339 (Ray & Young ed. 1956). After Ballew had been convicted, Walchek was tried in Grimes county and acquitted. On Ballew's appeal, he asked leave to file with the Court of Criminal Appeals the record of the Grimes county proceeding, and prayed for reversal and a new trial so that he might have the benefit of Walchek's testimony. The court refused to permit this, saying, at 399, 199 S.W. at 1109:

> As stated, all these proceedings in the Grimes county district court and the acquittal of Walchek occurred long after the trial of appellant in Waller county and many weeks after the court in Waller county had adjourned for the term at which appellant was convicted. A mere recital of these facts makes it clear and certain that this court is without power or authority to reverse this case on this ground. This court is an appellate court, not a trial court. It can hear no evidence on any such issue as is tendered by appellant herein. The decision of any case in this court must be made from the records brought up in the transcript on the trial in the court below. * * * So that this court cannot permit the filing of the said proceedings in the

Walchek case in Grimes county, nor consider them for any purpose.

Finally there is at least one case in which the Court of Criminal Appeals applied this rule to affirm a clearly erroneous conviction, even though both parties and the trial judge had agreed that matter not in the record might be presented. The case is *Donohue* v. *State*, 102 Tex.Cr. 151, 277 S.W. 657 (1925). Two persons were indicted separately, but for similar crimes, in a particular county. In each case motions were made attacking the failure to include the names of all qualified jurors in the jury wheel. In the first case the trial judge took evidence on the motion and denied it. In Donohue's case it was agreed by counsel, with the approval of the trial court, that the court would consider as being in evidence the facts which were introduced in the earlier case. The trial court then denied the motion. In the first case, there was reversal on appeal, since it was held that the jury had been improperly selected. Despite the agreement below to incorporate by reference the other testimony, the Court of Criminal Appeals held that the evidence in the first case was not a part of the record in Donohue's case, and since the record was then bare of any evidence in support of the motion, the court affirmed Donohue's conviction.

II.

In the present case, the material now brought forward by the state is in the nature of newly discovered evidence. The time has long since past when petitioner might apply for relief from the trial court on this ground. Such a motion must be filed within 10 days after conviction as evidenced by the verdict of the jury, Texas Code of Criminal Procedure, art. 755, although the court does have some

power to hear such a motion within the same term of court after expiration of the usual time for moving. *Atkinson* v. *State*, 164 Tex.Cr. 421, 299 S.W.2d 951 (1957). In this very case, petitioner moved in the trial court on July 15, 1961, for an extension of time to move for a new trial on the basis of newly discovered evidence. The motion was refused (R. 24-25), and the Court of Criminal Appeals held that "the court was without jurisdiction after expiration of the term to grant appellant's request for extension of time." *Ex parte Bush*, 353 S.W.2d 855, 858 (Tex.Cr. 1962). If the trial court lacked jurisdiction to grant such relief in 1961, it lacks jurisdiction to grant it in 1963.

There is a statutory procedure, under Texas Code of Criminal Procedure, art. 932b, § 3, by which, so long as this appeal is pending, application could be made to suspend the proceedings on the ground of present insanity. Such an application must be made to the trial court. *Gibbs* v. *State*, 165 Tex.Cr. 429, 308 S.W.2d 515 (1958). This procedure is wholly inadequate to provide petitioner the relief to which he believes he is entitled. It would not permit determination of whether he was insane at the time of the alleged crime or the time of his trial. It would merely suspend the proceedings against him, and he would be confined in a mental hospital "as a person charged with a criminal offense until he becomes sane." He would be denied the opportunity for furlough from the mental hospital which is available to one under a civil commitment. That this is not sufficient relief for a defendant who believes he has been unjustly convicted is evidenced by § 5 of art. 932b, which provides that "upon motion of a defendant's counsel an appeal from a conviction may be prosecuted."

Nor should petitioner be required to have his conviction affirmed, and seek some collateral remedy. It is very doubt-

ful whether there is any collateral remedy open to him. *Ex parte Elkins*, 168 Tex.Cr. 117, 324 S.W.2d 1 (1959), holds that habeas corpus is not available to challenge sanity at the time of a crime or of trial. Even if there were such a possible remedy, petitioner is entitled, on direct review of his conviction, to have it set aside if error was committed, rather than being forced to hunt, probably unsuccessfully, for some collateral remedy.

III.

Two Texas cases, somewhat resembling the present case, suggest that Texas would afford petitioner no relief even if there were no procedural bar to relief. In each case a death sentence was affirmed despite newly discovered evidence, presented in timely fashion to the trial court, raising doubt as to the sanity of the defendant. In *Covin* v. *State*, 130 Tex.Cr. 285, 93 S.W.2d 428 (1936), the defense did not know that alienists from a state hospital had examined defendant until they testified at the trial. The defense immediately moved for a continuance so that it might have its own psychiatric examination made, but the trial court denied the motion. Immediately after trial a motion for a new trial was made, accompanied with an affidavit of an alienist who had examined defendant for the defense after trial, in which the doctor stated that defendant was insane. The Court of Criminal Appeals affirmed the conviction. It found no error in the refusal of a continuance or in the denial of the motion for a new trial. It said, at 288-289, 93 S.W.2d at 430:

> If this court should ever lay down a rule that the accused was entitled to a rehearing or a new trial of his case in order that each newly discovered alienist or expert might have the weight of his testimony passed

> upon by a jury, it is quite evident that we would speedily reach a condition in our practice that one new trial after another might be demanded because of the discovery of this new alienist or the other, and, we might add, one after the other. We have no desire and have never intended to lay down such a rule.

Much the same situation was involved in *McCune* v. *State*, 156 Tex.Cr. 207, 211, 240 S.W.2d 305, 309 (1951), where the court said

> a halt must be called somewhere and * * * a new trial cannot be granted every time an alienist is discovered who will testify that appellant is insane.

In the *McCune* case the court did say that defendant might still seek the benefits of the statute dealing with insanity after conviction, but, as has already been pointed out, this would result only in a suspension of execution rather than a new trial or a vacation of the conviction.

CONCLUSION

Regrettable—and perhaps remarkable*—as it may seem, there appears to be no way in which petitioner can obtain relief from his conviction, despite the new evidence which the state has presented, save by reversal on the merits in this Court.

Respectfully submitted,

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Austin 5, Texas

BILLY J. MOORE
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Ennis, Texas

Attorneys for Petitioner

March 2, 1963

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*This is a case of the utmost seriousness, and counsel would not wish to treat it with levity. It does appear, however, that the fifth chorus of Dean Prosser's song, "The Common Law of Texas," is remarkably apt:

"It's the damnedest jurisdiction
Upon this planet sad,
Its whole judicial process
Is absolutely mad.
There's schizophrenia in New York,
Also in Illinois,
But the common law of Texas is
A psychiatric joy."

Law School Association Lyrics 70 (Prosser ed. 1962).